No. 2177

United States
Circuit Court of Appeals
For the Ninth Circuit.

C. M. SUMMERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error.

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Circuit Court of Appeals for the Ninth Circuit, at San Francisco.

No. 2177.

C. M. SUMMERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE GOVERNMENT'S POSITION.

This is a criminal prosecution for violations of section 5209, R. S., which section is a part of the national banking act of the federal Government and designed to enforce the administrative provisions of that act. The indictment contains 56 separate counts and is prepared in conformity with the provisions of section 1024, R. S.

This indictment is attacked by demurrer, on the ground that by reason of the fact that it contains more than one count, it is in violation of section 43 of the Alaska Criminal Practice Code. The prosecution answers that the crimes charged are "federal crimes," as distinguished from local crimes, and that, therefore, the Federal Practice Code, and not the local Alaska Practice Code, must govern the proceedings. The Government contends that in Alaska two separate systems of criminal prosecution obtain: prosecutions under laws enacted by Congress in its capacity of a federal legislature, and prosecutions under laws

enacted for Alaska by Congress sitting as a territorial legislature. The Alaska Criminal Practice Code of 1899 was enacted by Congress in its latter capacity, and its provisions were not intended to effect any change either in the substantive laws of a federal character or in the laws of procedure devised for the enforcement of the federal laws. This will not only appear from the language of the code itself, but from the history of its enactment as well as from numerous provisions both in the local and federal laws which in themselves clearly presuppose the application of the federal practice to the federal offense.

Before proceeding with the argument it should be distinctly borne in mind that though an act be denounced by Congress as a crime, it is not thereby a "federal" crime as distinguished from a local or territorial crime. Congress has two distinct functions: that of a federal legislature and that of a territorial legislature. As a federal legislature it has only such powers as the Constitution in express language has conferred upon it, all other powers being by implication deemed reserved by the States. As a territorial legislature it has all such power as the Constitution has not expressly withheld. In its capacity as a territorial legislature Congress may delegate its power to local legislatures, but its power as a federal legislature cannot be delegated. This duality of jurisdiction results in placing the stamp of federal legislation upon some enactments of Congress and that of local legislation upon other enactments and confers a dual jurisdiction upon the territorial courts.

In support of its position the Government proposes to show:

1. The history of the Alaska Code discloses the intent of Congress to have it apply only to local offenses and to maintain thereafter the dual character of the District Court of Alaska and its practice.

2. The Alaska Practice Code of 1899 expressly forbids its application to federal offenses.

3. The federal criminal practice is specially devised by Congress for the enforcement of federal authority, and necessity dictates that the federal remedy follows the federal right.

4. Certain provisions of the Alaska Code are clearly inapplicable if the federal penal laws are to be uniformly administered and enforced.

5. Federal laws are drafted with a view to their enforcement by federal procedure and certain provisions of these laws are capable of enforcement only under such procedure and indicate, therefore, that the latter must be applicable to these cases.

6. The application of local procedure to federal crimes would lead to conflict of authority and would result in crippling the federal sovereign.

7. The course of congressional legislation and the decisions thereunder prove that Congress could not have intended that local procedure be applied to federal offenses.

8. The general laws of the United States have been extended to Alaska, and such extension in itself made the federal procedure applicable by force of the doctrine enunciated by the Supreme Court in Page vs. Burnstine, *infra.*

9. The decisions cited by counsel for plaintiff in error are not to the point because they are decided under entirely different statutes and different facts from those herein involved and are in no manner controlling, nor even applicable.

10. The practice before the Alaska courts in federal cases is now, and in the past has been, to follow the rules of federal practice.

11. The history of section 1024 shows that in its original form that section was inserted into the general laws for the purpose of restraining the officials of the Courts from accumulating unnecessary and unreasonable fees by a mutiplicity of suits which ought to be joined. The same fee system having been extended to Alaska, it must be presumed that it was the intention of Congress that it would be subject to the safeguards which circumscribed it in the States, of which safeguards section 1024 was and is one.

12. The alleged error complained of is technical and not substantial; it goes only to the form of the indictment, not to the merits of the case, and even were the indictment technically defective, that defect was waived by defendant when he refused to deny the truth of the allegations, but demurred and demanded to have judgment entered upon the general demurrer without trial. He cannot now allege error upon a ruling which might not have injured him had he gone to trial and could not have injured him had he stood trial and been acquitted.

13. The proceedings resulting in judgment are tantamount to a plea of *nolo contendere,* which has

the same force and effect as a plea of guilty, and after a judgment upon a plea of guilty no objection can be urged, except to the jurisdiction of the Court, and the general one that the indictment does not state facts constituting a crime. All other objections, though made in due time, are waived.

ARGUMENT.

I.

THE PROVISIONS OF THE ALASKA CODE.

A.

History of Enactment in Question.

A civil government was first provided for Alaska by the Act of May 17, 1884. By section 7 of that Act it was provided "that the general laws of the State of Oregon now in force are hereby declared to be the law in said District, so far as the same may be applicable and *not in conflict with* the provisions of this Act or *the laws of the United States.*"

It is very evident that the criminal practice code of Oregon thus extended to Alaska would come in conflict with the federal practice provisions wherever an attempt was made to apply it in the prosecution of federal offenses. It is now well settled that by the Act of May 17, 1884, Alaska became an organized territory, and that, by reason of that fact, all general laws became applicable to Alaska by force of section 1891, R. S., as well as by force of the express provisions of Section 9 of the Act of 1884.

Nagle vs. U. S., 191 Fed. 141.

I. C. C. vs. U. S. ex rel. Humboldt S. S. Co., decided April 29, 1910, by Supreme Court.

Among these laws of general application which thus became extended to Alaska were the various provisions of the federal laws relating to practice and procedure.

Page vs. Burnstine, 102 U. S. 664 (quoted p. 56).

Kie vs. United States, 27 Fed. 351 (356).

That the practice provisions of the federal courts became extended to Alaska by Act of 1884 was early recognized and forever settled by the decision of Judge Deady in Kie vs. United States, where it is held:

> "So far as the laws of the United States prescribe the jurisdiction of the District and Circuit Courts, *or the method of their procedure,* or define a crime and prescribe its punishment, the Alaska Court is governed by them, and when these are silent, or make no provision on the subject, resort must be had to the laws of Oregon, so far as they are applicable."

And again in the same decision:

> "No law of Oregon is to have effect in Alaska if it is in conflict with a law of the United States. There is such a conflict, within the meaning of the statute, not only when these laws contain different provisions on the same subject, but when they contain similar or identical ones. In the latter case it is the law of congress that applies, and not that of the state."

The Oregon practice was, therefore, pursuant to the terms of the aforementioned section 7, in the prosecution of federal offenses, in conflict with the

federal law. In practice the operation of the Oregon law was confined to the crimes denounced by the Oregon Code and such other laws of a local nature as Congress enacted exclusively for Alaska. Though Alaska was under the exclusive jurisdiction of Congress, the courts discharged dual functions: those of a territorial tribunal and those of a federal tribunal. In this respect it was not different from the courts in the territories.

Ex parte Crow Dog, 109 U. S. 556 (560).
U. S. vs. Folsom, 38 Pac. 70.
Gon-shay-ee, 130 U. S. 343 (348).
Billingsley vs. U. S., 178 Fed. 653.
U. S. vs. Pridgeon, 153 U. S. 48.

In the first of the above cases the Supreme Court said:

> "The district court has two distinct jurisdictions. As a Territorial court it administers the local laws of the Territorial government; as invested by act of Congress with jurisdiction to administer the laws of the United States, it has the authority of circuit and district courts."

In the Folsom case, the Court, holding that the United States practice provisions applied to federal cases in a territorial tribunal, said:

> "We are also of the opinion that, in any event, the territorial law would not apply in this case, as the jurisdiction of the district courts in trying offenses of this character is as separate and distinct from the jurisdiction in trying territorial causes as is the jurisdiction of state courts and United States courts held within the States."

This dual jurisdiction of the court was carried out by dual means. To illustrate: Section 1230, Hill's Annotated Oregon Code provided:

> "A grand jury is a body of men, *seven* in number, drawn by lot from the jurors in attendance upon the court, having the qualifications prescribed by chapter 12 of the Code of Civil Procedure, and sworn to inquire of crimes committed or triable within the county from which they are selected."

While such a grand jury would be perfectly legal for the purpose of prosecution for violations of the Oregon laws made applicable to Alaska, it would be altogether inadequate for inquiring into and indicting for violations of the federal laws. At the very inception of criminal prosecution within the District of Alaska there were, therefore, necessarily two methods of proceeding concomitant with the two jurisdictions.

The same duality of the Government is recognized in section 2 of the Act of 1884, defining the duties of the governor: "To the end aforesaid he (the governor) shall have authority to see that the laws enacted *for said district* are enforced. . . . . He may also grant reprieves for offenses committed against the laws of the *district* or of the *United States.*" . . . .

The laws of the district and the laws of the United States are here placed in juxtaposition and treated as two separate bodies of laws. The authority of the governor is confined to the laws of the district, except that he may grant reprieves for offenses committed

against the laws of the United States as well as for those committed against the laws of the District.

B.

Express Intent of Congress.

These dual functions of our courts were clearly appreciated and purposely retained by Congress when the Act of March 3, 1899, was prepared. The enacting clause of that law provides:

> "That the penal and criminal laws of the United States of America and the procedure *thereunder* relating to the District of Alaska shall be as follows."

"Procedure thereunder" cannot be interpreted to mean procedure under *any* law, but only under the laws created by that Act. It is obvious that at the very outset the limitations upon the scope of the Act had been determined upon and were kept in mind and emphasized.

Title I, being Part I of the Carter Code, then defines the crimes. Then follows the Code of Procedure, being Title II of the Act of March 3, 1899, otherwise known as Part II of Carter's Code. The first section is significant, and reads as follows:

> "That proceedings for the punishment and prevention of the crimes *defined in Title I of this Act* shall be conducted in the manner herein provided."

This section carries out the determination manifested in the enacting clause and expressly and carefully restricts the operation of this Practice Code to the crimes defined in Title I, for to say that it shall

apply to one class of crimes is tantamount to saying it shall not apply to any other, under the familiar canon of statutory construction that *expressio unius est exclusio alterius.* To hold in face of the language of this section that this code nevertheless applies to all crimes, whether of a national or local character, would be to do violence not only to the most obvious import of ordinary English words but to the most universal canon of statutory construction.

All the subsequent sections of this code must be read in the light of this explicit limitation of their applicability.

C.

Section 10, Alaska Code.

It is argued for plaintiff in error that section 10 of the Practice Code in question, which provides for a grand jury, is in conflict with section 1 above quoted, and shows the intent to apply the same proceeding in all prosecutions, but we submit that section 10 is a confirmation of the congressional intent expressed in section 1. For the convenience of the Court the section in question is quoted in full:

> "That grand juries, to inquire of the crimes designated in title one of this Act, committed or triable within said District, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand jurors of the United States district and circuit courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all of-

fenses committed or triable within said District, as well those that are designated in title one of this Act as those that are defined in other laws of the United States."

This section clearly contemplates the dual jurisdiction of the courts and the two systems of procedure, but it changes the old rule prevailing under the Oregon law above referred to, and provides that the same grand jury which is necessary in federal cases may also "inquire of the crimes designated in title one of this Act." The section is avowedly framed to obviate the old necessity of two separate grand juries. The "true intent being" that the one grand jury shall "inquire into all offenses, *as well* those that are designated in title one of the Act as those that are defined in other laws of the United States." It is evident Congress realized that the Act in question was so obviously limited to local or territorial crimes by section 1 and the enacting clause that the grand jury provided for by the Act would have no jurisdiction to inquire into federal offenses unless that authority was expressly conferred on that body.

D.

Section 13, Alaska Code.

Section 13 reads as follows:

"The grand jury shall have power and it is their duty to inquire into all crimes committed or triable within the jurisdiction of the Court and present them to the Court either by *presentment,* or *indictment,* as provided in this Act."

It is argued for plaintiff in error that this section overrides section 1 and commits the grand jury in all cases to the proceedings prescribed by the Alaska Code, and, therefore, makes section 43 applicable both to federal and local crimes, but it is evident that this section refers to the work of the grand jury sitting as a territorial tribunal dealing with infractions of the territorial code alone. Any other construction would render section 1 nugatory, which is not permissible if the two can be harmonized. In other words, section 13 must be construed in light of the general limitation imposed by section 1. As has already been pointed out, the Oregon law was by the Act of May 17, 1884, made applicable only where there was no general or special federal law covering the subject. It was a temporary arrangement to provide for a local government. It must also be obvious that the Alaskan Penal Code of March 3, 1899, was enacted to supersede the Oregon Code in the particular field it covered, for the former is almost in its entirety taken from the latter. If, therefore, it had been the intent of Congress to revolutionize the whole practice and make this practice code control in both federal and territorial cases, that intent would most naturally have been expressed in unequivocal language by the Act itself; but the contrary is the case. The very opposite intent is expressed, to guard against every possible excuse for misunderstanding.

The mystery about section 13 arises from the fact that it is taken with its surroundings bodily from the

Oregon Code, being section 1242 of Hill's Annotated Laws of Oregon. Where it was taken from it refers only to local crimes and local proceedings and should not now be construed to refer to national crimes. In other words, by retaining section 13 in the same form in which it already applied to Alaska as part of the laws of Oregon, it was not intended to change its meaning or extend its application.

But upon closer inspection there is not even in the language of section 13 any conflict with the language used in sections 1 and 10. This has been clearly pointed out by Judge Lyons in his discussion of this subject set out in Appendices A and B. Section 1 provides that the practice provisions of the Code shall apply only to the local crimes; but section 10 declares that the one grand jury shall have jurisdiction over both classes of offenses, and adds that its "proceedings shall be conducted in manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts." That is, when sitting as grand jurors of United States District or Circuit Courts, i. e., in federal offenses, it shall proceed according to the rules prescribed for those courts.

Counsel has endeavored to prove that Judge Lyons has confused the term "proceeding" with that of "procedure," but it is evident that the confusion is counsel's, not the Court's. The relation as well as the distinction between these two terms is very simple and easily comprehended, viz., the "proceedings" of a court are those acts which a court *does;* the "procedure" is the *rules by which* the court does

them. The proceedings of a grand jury are the acts of a grand jury, while the procedure is the law or rule pursuant to which the acts are done. All proceedings are thus governed by the procedure.

Where, therefore, section 10 says that the proceedings shall be governed by a certain law it is tantamount to saying that they shall be governed by a certain procedure, namely, the procedure laid down by that law, in this case the law of procedure governing the United States Circuit and District Courts. Where section 13, therefore, says that the grand jury shall present all crimes either by *presentment* or *indictment* "as provided in this act," it is in perfect harmony with both section 1 and section 10, for those sections clearly point out the two procedures, or, to save confusion, the two rules of proceeding, the federal and the local.

E.

Rules of Construction Applicable.

The cardinal canon of statutory construction imposes upon the Court the primary duty of seeing that no part of a statute is annihilated by judicial interpretation. If two sections of a statute are seemingly conflicting, it is the first duty of the Court to endeavor to harmonize the two and let neither perish. Where one part of a statute is susceptible to two constructions and the language of another part is clear and definite and is consistent with one of such constructions and opposed to the other, that construction must be adopted which will render all clauses harmonious.

36 Cyc. 1132.

Words should sometimes be given a narrower meaning by the Courts than they apparently at first blush import. As was said by Chief Justice Taney in Brewer vs. Blougher, 14 Peters, 177 (197):

> "It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

On the same subject,—the various provisions of an act should be read so that all if possible have their due and conjoined effect. To use the language of Chief Justice Marshall in Pennington vs. Coxe, 2 Cranch, 33 (52):

> "That a law is the best expositor of itself; that every part of an act is to be taken into view, for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes, which have been uniformly acknowledged."

To paraphrase the language of Judge Sanborn in U. S. vs. 99 Diamonds, 139 Fed. 961 (963), and apply it to the case at bar, it may be said that the construction of the Alaska Penal Code contended for by plaintiff in error "flies in the teeth of the maxim that all

the words of a law must have effect rather than that part should perish by construction." To hold that the Alaska Practice Code applies to all offenses is to annihilate section 1, Title II, and the enacting clause of that code.

The various sections and enactments involved in this subject are, however, so carefully analyzed by his Honor, Judge Lyons, in the written opinion rendered last April in the case of United States vs. The North Pacific Wharves and Trading Company et al., and for the convenience of the Court attached to this brief as APPENDIX A, that nothing further remains to be said on this feature of the case. Two oral opinions by the same learned jurist in the case at bar, referring to the opinion in the case last above mentioned, are also hereto attached as APPENDIX B.

II.

REASON AND NECESSITY DICTATE THAT THE FEDERAL REMEDY FOLLOW THE FEDERAL RIGHT.

It is not necessary to place upon narrow grounds or even upon explicit language the argument that the Alaska Criminal Code of Procedure should not be followed in prosecutions for federal offenses, for independently of the fact that such a course of proceeding is not authorized either by our code or by the decisions, it is not in consonance with common sense or reason. The District Court is given the power, and it is its duty where a federal offense is charged, to exercise the jurisdiction of the Circuit

and District Courts of the United States. How can it exercise that jurisdiction if it cannot make use of the same procedure that they use? The District Court not only has such jurisdiction—it is not only the static possessor of such jurisdiction, but it is to exercise it, to bring it into action. Now, in the nature of things, it can do so in fullness and completeness only by following the same procedure which prevails in those courts.

Will the court of Alaska be required to exercise the functions of these federal tribunals, and at the same time be denied the right to employ the same instrumentalities of procedure devised for the discharge of these duties? It is the contention of the Government that these instrumentalities were provided by Congress as the means of enforcing federal authority generally, and it must of necessity follow that authority, as an integral part of it, into whatever court upon which that authority is bestowed.

This becomes especially evident where the "administrative laws," so called, are involved, such as the land laws, the customs laws or, as in this case, the banking laws. All these enactments bear internal evidence of having been drafted with a view to their enforcement through the medium of the federal procedure.

Illustration.

A forcible illustration of how the remedy must follow the right is also afforded by the various statutes of limitation of actions prescribed by the general federal laws.

The limitation of actions for forfeitures and penal-

ties is by section 1047, R. S., fixed at *five* years, and section 1046, R. S., provides:

> "No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within *five* years next after the committing of such crime."

Both of these sections are in conflict with any provision of any purely territorial code which could be brought to bear on the subject. Both sections relate purely to procedure. Neither establishes any right or duty, neither is a rule of property, or any other form of substantive law; each is solely the law of the forum. In that respect it is in class with section 1024 here in question.

Will it be contended that these sections (1046 and 1047) do not apply either in Hawaii or in Alaska? Surely not. They are part and parcel of the rights and duties which they are devised to enforce. But if these two practice provisions apply no legal reason can be assigned for not applying with equal force in the same character of cases section 1024. It is a case of a distinction without a difference. To hold that section 1047 extends to Alaska, but at the same time hold arbitrarily and without reason that section 1024 does not, will reduce legal logic in the mind of the layman to a hypocritical farce.

This very question arose in the Folsom case, and the court promptly held that the federal statute of limitation applied. Consistently with this ruling and upon the same logic the Court held in the same deci-

sion that section 1024 applied.

Even at the present time the question is before the prosecuting officers, and may soon be before the courts of Alaska, as to whether or not action for forfeitures and penalties imposed by the federal immigration laws must be commenced within one year as prescribed by the Alaska code or within five years as provided by R. S.

The immigration act of February 20, 1907, as amended by act of March 26, 1910, provides that any person or corporation guilty of importing contract labor shall forfeit the sum of $1,000 for each offense, and that this penalty may be sued for and recovered either by the Government or by a private individual. Sec. 1047, R. S., provides such action may be brought within five years, while section 10, Part IV, Code of Alaska, fixes the limitation in actions for forfeitures and penalties to one year. Which prevails? We have found no difficulty in arriving at the conclusion that Congress aimed to have the law enforced by means of the federal machinery.

A strong statement of this principle here presented is to be found in the dissenting opinion of Chief Justice Zane, of the Supreme Court of the Territory of Utah, delivered in the case of United States vs. Jones et al., 18 Pac. 233 (5 Utah, 552). In that case two defendants were accused of the crime of bribing a United States officer, in violation of section 5451 of the Revised Statutes of the United States. They demanded separate trials under the provisions of a territorial statute; their demand was refused by the trial court and the refusal was alleged as error. The Chief Justice says:

"The general rule is that persons jointly indicted are tried together. . . . . But, conceding that the general rule is that the court may grant a separate trial in its sound discretion for a cause shown, it is claimed that the practice in the case in hand is controlled by section 262, Laws Utah, 1878:

" 'When two or more defendants are jointly indicted for a felony, any defendant requiring it must be tried separately. In other cases the defendants jointly indicted may be tried separately or jointly, in the discretion of the court.' Should this territorial statute be applied to a criminal case under the laws of the United States? One sovereignty has no power to make laws for another. It is true that Congress may adopt rules of practice enacted by a state, but in criminal prosecutions for violations of the laws of the United States congress never adopts the rules of practice enacted by the state legislature. It is also true that the territorial government is not a sovereignty. It is a government, however, whose legislative power extends to all rightful subjects of legislation consistent with the constitution of the United States and the laws thereof. It has powers to make laws for the territory, not for the United States. It possesses such power as congress has given it. In section 6 of an act to establish a territorial government for Utah, congress has declared 'that the legislative power of said territory shall extend to all rightful subjects of legislation consistent with the constitu-

tion of the United States and the provisions of this act.' And in section 9 of the same act, after mention of the supreme, district, and probate courts, and justices of the peace, the following language is found: 'The jurisdiction of the several courts herein provided for, both appellate and original, ... shall be as limited by law, ... and each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States.' Similar language is found applicable to all the territories in section 1910 of the Revised Statutes of the United States. The district courts in the territories are required to exercise the same jurisdiction in all cases under the constitution and the laws of the United States as is vested in the circuit and district courts thereof. The territorial legislature had no power to restrain or control the district court in the exercise of its powers and jurisdiction in any cases arising under the laws of the United States. Its authority was such as the circuit and district courts possessed, and it had the power to exercise it to the same extent as those courts might. The jurisdiction of a court consists of its lawful authority to act as a court. The jurisdiction of a court embraces all the discretion it may lawfully exercise, and every decision and order it may lawfully make, every writ that it issues, and every judgment that it pronounces. The juris-

diction of a court, the authority of a court, and the powers of a court, are synonymous terms. Their legal meaning is the same. The jurisdiction of the circuit and district courts of the United States embraces their authority to order the separate trials of parties jointly indicted, the making of such an order either denying or granting a separate trial is as much an exercise of the jurisdiction of those courts as the making of any other decision or entering any judgment in the case, interlocutory or final. In the case of Hopkins vs. Com., 3 Metc. 460, the supreme court of Massachusetts, Shaw, C. J., delivering the opinion of the court, said: 'The word "jurisdiction" (*Jus dicere*) is a term of large and comprehensive import, and embraces every kind of judicial action upon the subject-matter, from finding the indictment to pronouncing the sentence. . . . . To have jurisdiction is to have power to inquire into the fact, to apply the law, and to declare the punishment in a regular course of judicial proceeding.' . . . . These two cases establish clearly that jurisdiction includes the power of the court to issue all lawful writs and the making of all lawful rulings, orders, and decisions. All its lawful action is exercise of its jurisdiction. The powers of a court constitute its jurisdiction. If the circuit and district courts of the United States possess the jurisdiction, the authority to grant or deny separate trials, in their discretion, then the third district court in the case in hand possessed the

same authority, the same power, the same jurisdiction."

And again the Chief Justice says:

"The United States court, having the power, may adopt the same rules of practice as the state courts are governed by. In criminal trials, under the laws of the general federal government, the courts do not adopt rules of practice prescribed by state legislatures. Section 914 of the Revised Statutes of the United States, in force June 1, 1872, changed the rule in certain civil cases. It is: 'The practice, pleading, and forms and modes of proceeding in civil causes other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleading, and forms and modes of proceeding existing at the time in like causes in the courts of record in the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.' Congress has always been careful to leave the practice in the trial of crimes against the United States the same throughout its jurisdiction. Its definitions of crime are the same within the limits of its jurisdiction, and the practice and evidence for the trial of persons charged with crimes against its laws should also be uniform. For the same kind of offenses against the federal government persons accused of crime should not be tried according to different rules of evidence and practice in different parts of the country. Such rules ought to be of

general application throughout its jurisdiction. Section 1891 of the Revised Statutes of the United States declares that 'the constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within all the organized territories, and in every territory heretofore organized, as elsewhere within the United States.' Federal laws defining crimes and providing for their punishment are enforced and made effectual by means of a trial and conviction, and if the territorial legislature may prescribe rules of evidence and practice to be applied in such trials, then the effect of the laws defining such crimes, and providing for their punishment, will depend largely upon the action of such legislature, and those laws will not have the same force and effect in the territories as elsewhere within the United States. Whether the district courts of the territories are United States or territorial courts it is not necessary to determine for the purpose of this case. They are undoubtedly established by virtue of laws of the United States. Whether the power to enact such laws is incident to the right to acquire territory, and hold it, or is in pursuance of the authority to make all needful rules and regulations respecting the territory belonging to the United States, it is not necessary to determine now. The judges are appointed by the president, by and with the advice and consent of the senate, and in like manner the marshal and prosecuting attorney are ap-

pointed. Their terms of office are fixed by federal laws, and they are paid by the United States. The district court of the territories, considered with respect to the authority by which they are established, must be regarded as United States courts. But they act as United States courts and as territorial courts. They act in two capacities. When engaged in the trial of cases under the laws of the United States they are acting as United States courts, and when engaged in the trial of cases that would be tried in the state courts, were the territory a state, they act as territorial courts. The true position to take undoubtedly is that, when engaged in the trial of cases under the laws of the United States, they possess all the powers, the same jurisdiction, as circuit and district courts of the United States when so engaged."

In the case of Wayman vs. Southard, 10 Wheat. 1, Chief Justice Marshall was discussing the construction to be placed upon the 14th section of the judiciary act of 1789, which is virtually section 716 of the Revised Statutes, referring to certain powers granted to the various courts of the United States. It reads as follows:

> "That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided by statute, which may be *necessary for the exercise of their respective jurisdictions* and agreeable to the principles and usages of law."

The Chief Justice said:

> "The words of the 14th are understood by the court to comprehend executions. An execution is a writ, which is certainly 'agreeable to the principles and usages of law.' There is no reason for supposing that the general term 'writs,' is restrained by the words, 'which may be necessary for the exercise of their respective jurisdictions,' to original process, or to process anterior to judgments. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process subsequent to the judgment, in which jurisdiction is to be exercised. It is, therefore, no unreasonable extension of the words of the act, to suppose an execution necessary for the exercise of jurisdiction. Were it even true, that jurisdiction could technically be said to terminate with the judgment, an execution would be a writ necessary for the perfection of that which was previously done; and would, consequently, be necessary to the beneficial exercise of jurisdiction."

And we contend that in cases brought under federal laws in the District Court of Alaska it is "necessary to the beneficial exercise of jurisdiction" of the District and Circuit Courts of the United States that the court of Alaska pursue and use the same procedure which the courts of the United States use in such cases. As is already implied in the words of Chief Justice Marshall, "exercise of jurisdiction" of

necessity connotes the employment of the means or proceedings usually and naturally employed when such jurisdiction is exercised. In federal cases this is the federal procedure.

III.

THE ALASKA CODE OF CRIMINAL PROCEDURE CANNOT IN ITS ENTIRETY APPLY TO FEDERAL CASES.

Aside from the language of section 1, which expressly confines the operation of the code of territorial cases, there are numerous provisions in the local code which show that Congress could not have intended it to in any way supersede the federal practice in the prosecution of infractions of the national law. Take, for instance, chapter 39, prescribing proceedings in cases of extradition. It is copied *in toto* from the Oregon code, and provides, in substance and effect, that fugitives from Alaska may be brought back upon request from the Government of Alaska to the Chief Executive of the State in which the fugitive may be found, and that a fugitive from a State who is found in Alaska may be taken away by order of the Governor of Alaska upon request from the Governor of the State where the fugitive is wanted. If any part whatever of the Alaska Code applies to federal offenders, this part certainly does, for its language is as broad as the language of any other section or chapter. And in such event chapter 39 must be construed to supersede section 1014, R. S., which latter furnishes the remedy for the apprehension of federal offenders who have fled from one State to

another. But is such application of chapter 39 possible? Let us see. If chapter 39 of the Alaska Code supersedes the federal practice provided by section 1014, R. S., a person who has in some State of the Union violated some federal penal law and fled to Alaska can be returned to the State whence he fled only upon application by the federal authorities of that State to the Governor of the State, who in response to such application will have to issue a requisition upon the Governor of Alaska. But the Governor of the State in question will certainly answer that he has no jurisdiction over federal offenders, and if he should refuse to issue the requisition, no Court could compel him to do so. This would place the federal Government at the mercy of the State government in prosecutions to maintain the authority of the federal law. The same situation would arise should the Governor of Alaska issue a requisition upon the Governor of some State for the return of a fugitive for violation of a federal law in Alaska. The Governor of the State would still be without jurisdiction, and at any rate the federal Government would be dependent upon State authorities for the enforcement of its own laws. The mere statement of the proposition discloses its absurdity.

Article IV, section 2, of the Constitution of the United States provides:

> "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State

from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

But this provision has been expressly held not to apply to persons committing crimes within one District of the United States and fleeing to another District of the United States; the constitutional provision extends only to persons committing offenses against one State and fleeing to another State.

In United States vs. Haskins, 26 Fed. Cas. No. 15, 322, in which the question was under consideration as to whether where a person has committed an offense against the laws of the United States in the Territory of Utah and fled to the State of California he can be extradited under the provisions of section 1014 of the Revised Statutes, the Court said:

"I conclude, then, that an offender, after indictment found in one district, may, under this section, be arrested and imprisoned or bailed, as the case may be, for trial in any other district the courts of which have cognizance of the offense. This view is strengthened by the consideration that it is, if not certain, at least extremely probable, there is no other mode by which the defendant can be removed. The act of Congress, respecting fugitives from justice (1 Stat. 302), in pursuance of Article IV, s. 2, Const. U. S., provides a mode by which offenders against state and territorial laws, who have fled from justice, may be delivered up to the authorities of the state or territory demanding them,

but makes no provision for the case of those persons who have committed offenses against the United States in one district and have fled to another. If the defendant cannot be reached under this act, and in my judgment he cannot, there remains but one other course possible besides the one adopted in the case now under consideration, that is, for the judge of the district where the indictment was found to issue his warrant to the marshal of this district, where the defendant now is."

In the light of this and other authorities it is clear that section 393 of Title II of our code does not extend to or apply in the case of an offense against the federal laws. That section reads as follows:

"That whenever a person charged with treason or other felony, in said district shall flee from justice the governor of said district may appoint an agent to demand such fugitive of the executive authority of any State or Territory of the United States in which he may be found."

This section is adopted from the Oregon laws, and clearly, in view of the constitutional provision under which it is framed and in view of the decisions on the question, applies only to fugitives charged with offenses against the local laws of Alaska and not to fugitives charged with offenses against the laws of the United States as a nation.

In the case of United States vs. Haskins, *supra,* it was expressly decided that the provisions of section 1014 (which is section 33 of the judiciary act of 1789) are to be followed where defendants accused

of offenses against the federal laws are to be brought from one district into another to answer to the accusation—and that this is true where the accusation is made not in a State but in a territory having a court which is not strictly a federal court but is a territorial court exercising the jurisdiction of Circuit and District Courts of the United States. The Court said:

> "The question for determination is, whether the provisions of the thirty-third section of the judiciary act, touching the arrest and removal of offenders against the United States, must be limited in their operation to cases arising in those districts which embrace a state or some portion thereof? And the answer must be in the affirmative if the words 'district in which the trial is to be had,' in the third clause of that section, refer only to districts established or organized under that act. The act of 1789 divided the United States into thirteen districts. Since that time, as states have been admitted new districts have been organized, and so far as I can ascertain it has never been questioned that the general provisions of the judiciary act applied to the new districts without any express enactment of them for such districts; although by a narrow construction of the language it might be held to apply only to those courts and districts organized, and to which cognizance of crimes is given, by that act. The provision is that if the commitment of an offender is in a district other than that in which the offense is

to be tried, the judge shall issue his warrant for the removal of the offender to the district in which the trial is to be had. If, then, an offense against the United States may be tried in a district of Utah territory, there is nothing in the language of this provision necessarily forbidding a construction which will justify the removal of an offender there for trial. The organic act of Utah does extend the constitution and laws of the United States over the territory so far as the same may be applicable. It also makes provision for the organization of three district courts therein, and further provides 'that each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States.' Thus these courts have cognizance of all offenses committed in their respective districts, and as such an offense can only be tried in the district where it is committed, the offender, if he escapes from the territory, must go unpunished, unless he can be removed there for trial; and this only can be done under and by virtue of the provisions of the judiciary act. No other provision of law for such a case can be found, and it does not seem probable that Congress has left it wholly unprovided for. For, if it is doubtful that the warrant of a district judge of the United States can be executed out of his district, it is certain that the

warrant of a territorial judge cannot run out of his territory."

And subsequently in the opinion the court says:

"Now, the provisions of section 33 are of universal application, and are plainly intended to cover every offense against the United States, committed within the jurisdiction of any of its courts."

And the Court holds that the District Court of Utah is for these purposes a United States court. To use the language of the opinion:

"The plain intention is to provide for any and every offense against the United States. The crime charged in this case is such an offense and is triable before the district court of the third judicial district of Utah. While the district courts of Utah are neither state courts nor United States courts in the sense of the constitution, they are still courts established and organized under the authority of the United States, sitting in a territory belonging to the United States and exercising their jurisdiction conferred upon them by that government. The whole territory is under the plenary control of the general government, and the districts, while they are territorial districts, are still districts within which certain offenses against the United States must be tried if tried at all."

In this connection it is to be observed that section 393 of Title II of our Criminal Code is couched in language broad enough to cover these cases if the contention of the plaintiff in error is correct that

the code procedure applies to them. But not only do authority and reason indicate that the chapter in relation to fugitives from justice in our code does not apply to these cases, but its application thereto or to similar cases would lead to the most absurd and impossible consequences. For it is clear that throughout the Union there are two sovereign powers,—the federal sovereign and the State sovereign. It is equally clear that one governor cannot appeal to another for the arrest of a person charged with an offense against the laws of the United States committed within the territorial jurisdiction of the former, and it is likewise apparent that if such an appeal were made the latter Governor would have no authority to act upon it; for if the opposite conclusions could be entertained, in order to secure a due and proper enforcement of the federal laws it might be necessary for the federal sovereign to request one State sovereign to apply to another State sovereign for the extradition of persons accused of crimes against the federal sovereign. The inevitable result would be the debasement of the federal sovereign to a position of dependency upon the States, i. e., the overturning of our whole theory and system of government, which postulate the unquestioned and unquestionable supremacy of the federal sovereign in its own sphere of action. If the one State sovereign or the other should refuse to honor the request or be recalcitrant, the federal sovereign would be impotent and paralyzed. The natural and inevitable conclusion is that chapter 39 of our code, in spite of its broad general language, must be real in light of

the express restrictions as to its application set out in section 1 of Title II as well as in prior sections.

Now, it is clear that if section 1014 of the Revised Statutes applies to Alaska, so must sections 1015, 1016, 1018, 1019, 1020 and 1029, all of which relate in one manner or another to the proceeding described and provided in section 1014.

IV.

CERTAIN PROVISIONS OF THE ALASKA CODE OF CRIMINAL PROCEDURE, IF APPLICABLE TO SUCH CASES AS THESE, WOULD DESTROY THE UNIFORMITY OF ADMINISTRATION AND ENFORCEMENT OF THE FEDERAL PENAL LAWS.

One portion of our code which would obviously militate against uniformity of enforcement of the federal penal laws if it were held applicable to offenses against such laws, is section 481 of Title II of the Criminal Code. It is as follows:

> "That in any case where a conviction occurs, except in a case of murder or rape, the court may, when in its opinion the facts and circumstances are such as to make the minimum penalty provided in this act manifestly too severe, impose a less penalty, either of fine or imprisonment or both: Provided, That in any such case the court shall cause the reasons for its action to be set forth at large on the record in the case."

Federal statutes defining and providing for the punishment of crimes set forth explicitly the limits

within which the sentence may range. Clearly, if the Court, under the authority of this code provision, can affix a penalty less than the minimum prescribed by the federal laws, uniformity cannot longer be claimed for the federal penal laws. This result in itself indicates the positive intention on the part of Congress that section 481 should not apply in federal cases.

Still another section which would induce confusion and uncertainty and would likewise destroy the uniformity of operation of the federal criminal laws is section 192 of Title I, which is as follows:

> "That if any person attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, such person, when no other provision is made by law for the punishment of such attempt, upon conviction thereof, shall be punished by not to exceed one-half the maximum punishment provided by statute for the offense itself."

We may use the anti-trust law as an illustration. Section 3 of that act makes the entering into any contract, combination or conspiracy in restraint of trade a misdemeanor punishable by a fine not exceeding $5,000 or by imprisonment not exceeding one year or both. Now, if the proofs against defendants charged with a violation of said section 3 of the Anti-Trust Act should disclose that they had not entered into such combination in restraint of trade

but had attempted to do so, they would be punishable, if the contention of plaintiff in error be correct, under section 192 of Title II for making such attempt. The extent of the punishment which, under that section, could be inflicted by the court in case the jury found the defendants guilty of such an attempt is one-half that which is prescribed for the completed offense by section 3 of the Anti-Trust Act.

Clearly, this would create a great number of crimes under the federal laws which are not made such by the federal laws themselves and would destroy the uniform operation of such laws throughout the country. For there are scores of federal statutes applicable in Alaska which define crimes but do not make the attempt to commit such crimes punishable. The federal Code of Procedure makes an attempt to commit a crime punishable only when the attempt is itself specifically made criminal. Section 1035 of the Revised Statutes, which relates to this subject, is as follows:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided,* That such attempt be itself a separate offense."

Now, if our Code of Procedure is to be followed in the prosecution of such offenses, then we have a long list of crimes added to the federal Penal Code as far as its enforcement in Alaska is concerned, namely, the

crimes of attempting to commit the various substantive crimes defined in the federal laws. It is clear that Congress did not intend that laws of a national character should have such an unusual and extraordinary operation in the Territory of Alaska or in any State or territory; a construction which would so result should, if possible, be avoided, for it is clearly a construction violative of both federal law and the spirit of our institutions. In the interpretation of statutes presumptions are indulged against absurd consequences.

36 Cyc. 1136 (5)
Dekelt vs. People, 99 Pac. (Colo.) 330.
In re King, 75 N. W. (Iowa), 187.

If section 2 of the Anti-Trust Act were applicable to Alaska, then if a defendant prosecuted thereunder were found guilty of an attempt to monopolize, the provisions thereof relating to punishment would be in direct conflict with said section 192 of Title II of the Alaska Code, for the latter section would provide that the punishment shall be one-half that which is provided by the second section of the Anti-Trust Act. Which penalty would the Court impose, the one provided by the section which defines the offense or the one provided by section 192 of our code? Whichever horn of the dilemma the Court chose, it would be necessary that one provision or the other be not only ignored but violated.

Again: Many crimes denounced by the federal statute are by the same statute designated as misdemeanors and should be prosecuted as such, while if the Alaska Code applied to them, they must in this

territory be treated as felonies and be prosecuted as such. Hence, if counsel's theory were correct, the offender against such law would in the States be merely a wrongdoer while in Alaska he would be a felon.

These illustrations might be greatly multiplied, but we shall add only one more:

Section 190, Part II, of the Alaska Code provides:

> "That a judgment that the defendant pay a fine must also direct that he be imprisoned in the county jail until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two dollars of the fine; and in case the entry of judgment should omit to direct the imprisonment and the extent thereof, the judgment to pay the fine shall operate to authorize and require the imprisonment of the defendant until the fine is satisfied at the rate above mentioned."

Does this apply to federal offenses? If so, it supersedes section 1042, R. S., as well as section 5296, R. S. This would, for a multitude of reasons too obvious to need repeating, seem impossible.

Yet, the language of section 190 standing alone, is all-embracing, and sweeps section 1042, R. S., out of the way, unless the former is construed as limited by the language of section 1, Part II.

To hold that the Alaska Practice Code applies in federal cases would inevitably involve us in interminable trouble and confusion,—a result which should not be construed as contemplated by Congress.

V.

CERTAIN PROVISIONS OF THE FEDERAL LAWS INDICATE THAT THEY MUST BE APPLICABLE TO THESE CASES.

Aside from the language of the local code, there are numerous sections of the Revised Statutes whose unmistakable import is that the federal procedure must be applied in federal cases in the Alaska courts, which disclose the reasons, in part at least, why Congress carefully limited the general language of the various sections of the Alaska Code by the explicit limitations imposed by section 1.

Other sections of the Revised Statutes applicable are 921, 977, 980 and 982, which are as follows:

> "Sec. 921. When causes of a like nature or relative to the same subject are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

> "Sec. 977. If several actions or processes are instituted, in a court of the United States or one of the Territories, against persons who might legally be joined in one action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes

is satisfactorily shown on motion in open court."

"Sec. 980. When a district attorney prosecutes two or more indictments, suits, or proceedings which should be joined, he shall be paid but one bill of costs for all of them."

"Sec. 982. If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any Territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased."

These sections will hereafter be referred to in chapters XI, XII of this brief, but at this point the Court's attention is called to the fact that these sections together with 1024 were enacted partly for the purpose of depriving the court officers of the opportunity of unnecessarily increasing their own fees. As the fee system of remunerating United States attorneys, marshals and clerks was extended to Alaska by section 9 of the Act of May 17, 1884, it must be conclusively presumed that all these sections, including 1024, by which the legality of these fees must be measured, are also applicable.

We think it appears from section 1910 that Congress contemplated that the procedure in federal criminal cases should be that prescribed by the federal laws, for by that section not only are the territorial courts given authority to try such cases, but they are required to set aside a separate portion of

the term therefor. Section 1910 of the Revised Statutes is as follows:

> "Each of the district courts in the Territories mentioned in the preceding section [namely, New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming—(all of the Territories which were then known and called such at the time of the enactment of this law)] shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the supreme court of each Territory, as in other cases."

One provision of the Revised Statutes which must be applicable in Alaska if the laws of the nation are to be uniformly administered and enforced throughout the territorial limits of the United States, is section 1033 of the Revised Statutes, relating to the furnishing of lists of jurors and witnesses to a person accused of treason or other capital offense under the federal laws. But if the code of Alaska is the sole Code of Procedure in trials of crimes against the federal laws, then section 1033 cannot be resorted to.

VI.

THE APPLICATION OF LOCAL PROCEDURE TO CASES WHERE FEDERAL CRIMES ARE CHARGED WOULD LEAD TO CONFLICTS OF AUTHORITY AND WOULD CRIPPLE THE FEDERAL SOVEREIGN.

Another argument which undoubtedly induced Congress to limit the use of the local procedure besides that drawn from the inconsistency inherent in the application of a local Code of Procedure to a federal code of crimes, is the argument presented by the conflicts of authority to which such a course of proceeding would inevitably lead. The case of United States vs. Reid, 12 How. 360, was a joint indictment for murder against Reid and Clements, and by permission of the Court they were separately tried, and upon the trial of Reid he proposed to call Clements as a witness on his behalf under a statute of Virginia adopted in 1849. This statute would have rendered Clements competent could it have been applied to cases under the laws of the United States. The thirty-fourth section of the act of Congress of 1789 (which is section 721 of the Revised Statutes) declared that "the laws of the several States, except where the constitution, treaties, or statutes of the United States shall otherwise require to provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." The case came before the Supreme Court upon a certificate of division between the judges of the Circuit Court. In deciding the

point the Court said, by Chief Justice Taney:

> "But it could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress, and that the statute of Virginia was not the law by which the admissibility of Clements as a witness ought to have been decided." (p. 362.)

As Chief Justice Zane, of the Supreme Court of the Territory of Utah, says, in commenting on this case in his opinion in United States vs. Jones, *supra:*

> "The 'rules of evidence' referred to in the above quotation are to be applied in trials of offenses against the United States, whether in a district, a circuit court, or in a territorial court, in whatever court the trial might be had. The objection was to a state legislature prescribing rules to be used in the trial of offenses against the United States. If the territorial legislature may enact rules of evidence and practice to govern in the trial of offenders against the laws of the United States the criminal jurisprudence of the federal government is thereby placed under the control of a territory." (p. 237.)

If it be said that in Alaska there is but one sovereign—the United States—yet the practical difficulties

and incongruities would be as great here as they would be in a State if the local rules of procedure are to apply in federal cases. This is manifestly so because the code of Oregon, in substance, has been adopted as the code of Alaska. And the fact that the adoption of the code of Oregon was an act of Congress does not alter the situation so far as such incongruities and difficulties are concerned.

VII.

THE COURSE OF CONGRESSIONAL LEGISLATION AND THE DECISIONS THEREUNDER FULLY PROVE THAT CONGRESS COULD NOT HAVE INTENDED THAT LOCAL PROCEDURE BE APPLIED TO FEDERAL OFFENDERS.

Following the "rule of reason" that federal procedure be used in prosecutions for federal offenses, acts of Congress and the decisions dictate the same course. From the beginning of our Government Congress has in its various enactments relating to procedure in criminal cases in the federal courts manifested a steady and continuing determination to prevent the application to such cases of the procedure of the States. No doubt this policy on the part of Congress flows from the unreasonableness of applying to a system of laws which is intended to be uniform throughout the United States the varying and different codes of criminal procedure which are to be found in the several States. It cannot be affirmed that this policy is not intentional, for Congress has enacted laws making the procedure and even the rules of decision of the States in common-law civil actions

applicable in the federal courts, and it has made specific provision for the general procedure to be followed in equity and admiralty cases. Section 914 of the Revised Statutes of the United States is as follows:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Clearly, this does not apply to criminal cases.

United States vs. Gardner, 25 Fed. Cas. No. 15,187.

Section 721 of the Revised Statutes is as follows:

> "The laws of the several States except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

This section first became law in the original judiciary act of September 24, 1789, and has been the law in this country continuously since that time. As some of the courts have expressed it, there was no inherent reason why the expression "trials at common law" in this section should not apply to criminal trials as well as to common-law civil trials because certainly criminal actions are actions at common law. This section

originally stood between two sections clearly applicable to criminal cases, and yet it has been held that it does not apply to such cases. As was stated in United States vs. Reid, 12 How. 360:

> "It could not be supposed, without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States," nor the rules of decision either.

Section 858 of the Revised Statutes consists of parts of three different acts, one of which became law in 1862, another in 1864, and the third in 1865. The portions derived from the two latter acts relate to the competency of witnesses, and the portion derived from the law of 1862 is as follows:

> "In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

Here again the expression "in trials at common law" could have included all criminal trials under the penal statutes of the United States as far as the mere form and usual meaning of the words are concerned. But the plain intent and purpose of Congress not to apply these and similar sections to criminal trials was so evident to the courts that the latter have uniformly held that this provision, like others expressed in similar language, does not apply to such criminal trials.

For instance: The case of United States vs. Brown, 1 Saw. 531, Fed. Cas. No. 14,671, in the United States

District Court for the District of Oregon, and decided by Judge Deady in 1871, was upon an indictment under a federal law for corruptly impeding the due administration of justice in a United States court. The counsel for the defendants, namely, W. W. Thayer and L. Lair Hill, contended that under the acts of Congress assimilating federal procedure to state procedure the provisions of the Oregon code touching the competency of witnesses in criminal cases were applicable and governed the action. After quoting the language of Chief Justice Taney in United States vs. Reid, *supra,* Judge Deady held that the Oregon code provisions did not apply, because the case was a criminal case and those acts of Congress could not have been intended to cover and apply to such cases.

And in Logan vs. United States, 144 U. S. 263, 302, it was specifically held that the portion of section 858 taken from the law of 1862 "has no application to criminal trials."

In United States vs. Black, 1 Hask. 570, Fed. Cas. No. 14,602, the Court, referring to the provision now under consideration, said:

> "It was held in this circuit, by Mr. Justice Clifford, soon after the passage of these acts, that the law was not thereby changed as to the competency of defendants as witnesses in criminal causes, and they have never been received as witnesses; and this view was sanctioned by the supreme court of the United States, in Green vs. U. S., 9 Wall. 655. It is also well understood, that the attempt has been repeatedly made, but

without success, to induce congress to modify the law in this behalf, and allow persons under indictment to be examined as witnesses on the trial."

Other provisions of the Revised Statutes, such as those incorporated in sections 914, 915 and 916, assimilate the practice and procedure in common-law actions in the federal courts to the practice of the State in which the federal courts happen to be sitting. But such sections, wherever there has been any doubt expressed by counsel on the subject, have been held not to apply to criminal cases.

U. S. vs. Gardner, 25 Fed. Cas. No. 15,187.

As we have already stated, this policy to exclude the State's criminal procedure from all cases of a criminal nature arising under the laws of the United States and in the United States courts has been uniform and consistent, both on the part of Congress and on that of the federal courts. As was said by Mr. Justice Miller in United States vs. Hawthorne, 1 Dill. 422, 26 Fed. Cas. No. 15,332, which was upon an indictment under the federal law for having possession of counterfeit Treasury notes with intent to utter them:

"Crimes against the United States are wholly withdrawn from the domain of state legislation. They are created solely by congress, and congress has provided for their prosecution *and the mode of procedure.*"

The reason why Congress assimilated the practice in common-law actions of a civil nature to the prac-

tice of the States and refused to adopt the State's procedure in criminal actions, is clear. In the former class of actions property rights of one kind or another are involved, while in the latter class the question presented is always whether a certain state of facts constitutes an offense against the people of the United States at large. To determine the property rights it is necessary to have recourse not only to the modes of procedure, but to the statutes defining those rights to be found in the laws of the State where the property is located. But to determine the question whether a certain state of facts constitutes an offense against the United States, it is not necessary or proper or reasonable to have recourse to State laws. There the sole question is whether the federal law makes the facts an offense, and the only way of arriving at the same conclusion and to impose the same penalties in Massachusetts as in California, in Alaska as in Florida, is to apply the same substantive rules and modes of procedure.

In enacting that in common-law civil actions resort shall be had, so far as may be, to the states' laws for the procedure, Congress has simply applied the principle upon which we insist, namely, "the remedy follows the right."

It is argued that the provision in the Edmunds act authorizing the joinder of several counts in the same indictment for violation of the provisions of that act is at variance with the foregoing theory, and is proof that Congress considered section 1024 inapplicable to the territories. Such deduction is unwarranted. Section 3 of the Edmunds act provides:

> "Counts for *any* or *all* of the offenses named in the two sections last preceding may be joined in the same information or indictment."

An inspection of the "two preceding sections" will readily disclose the fact that not even under section 1024, R. S., could counts for all the offenses be joined, for the two sections of the Edmunds act denounce offenses of various grades as well as of various classes, felonies as well as misdemeanors, and are not always necessarily connected together. Such could not be united either at common law or under section 1024.

1 Bish. Cr. Pr. § 445.

U. S. v. Scott, 74 Fed. 213.

To make it certain, therefore, that any and all offenses which could be charged under this law could be joined in one indictment, even where section 1024 applied, section 3 of this act became necessary.

But in addition to this consideration it should be borne in mind that the Edmunds Law, though enacted by Congress, is not a federal law, not being enacted by that body exercising its federal jurisdiction, but is a local or territorial law enacted by Congress acting as a territorial legislature, and for that reason the local practice of the territories would apply to its enforcement.

In the New Federal Penal Code the Edmunds Law is adopted *verbatim,* and this circumstance affords counsel the excuse for saying that that compilation contains provision for joinder of some offenses, but not for the one here charged, and that therefore

it must be presumed it was not intended they could be so joined.

In this connection it may be noted that section 5209, R. S., the one under which this indictment is drawn, is not contained in the New Penal Code, for the very reason that it is a part of an administrative federal law, viz., the national banking laws, and the New Penal Code has no more to do with it than with the other administrative laws, such as the revenue laws, the customs laws, the transportation laws, the pure food law or the Sherman law, no part of either of which is adopted into the new codification.

It is also argued that Senator Carter and Mr. Paul Charlton, in their respective compilations of the Alaska laws, one known as the Carter Code and the other as Senate Doc. No. 142—1906—made no reference to the federal practice provisions, and that this omission on their part is evidence that these authorities considered these laws not applicable to Alaska, on the theory that they intended to embody all such laws in their respective compilations.

But it should be carefully noted that these compilations contain no laws except such as are of a local or territorial nature; no law of a purely federal nature is to be found therein. From this circumstance the deduction cannot be made, however, that those learned compilers thought that no general federal law applied. On the other hand, it may be fairly concluded that they realized that the general federal laws applied in Alaska with the same force and effect as in the States and the Territories, but that they constituted an entirely separate and distinct sys-

tem of laws enacted by virtue of other and different powers than those exercised by Congress in legislating for the separate localities. In other words, the compilers kept clearly in mind the distinction between the jurisdiction of Congress acting as a federal legislature and the jurisdiction of Congress acting under the powers conferred by the Constitution to exercise plenary power over the territories.

VIII.

THE GENERAL EXTENSION OF THE FEDERAL LAWS OF THE UNITED STATES TO ALASKA MAKES THE FEDERAL PROCEDURE AND NO OTHER APPLICABLE IN THE PENDING CASE.

It is our view that the general laws of the United States have been extended to Alaska, so far as they are applicable, and that the laws of procedure in criminal cases are as much laws of the United States as are laws defining crimes. In section 7 of the Act which provided civil government for Alaska (Act of May 17, 1884, 23 Stat. 24), it is said:

> "That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act *of the laws of the United States.*"

And in section 9 it is said:

> "That all officers appointed for said district, before entering upon the duties of their offices, shall take the oaths required by law, *and the laws of the United States, not locally inapplicable to*

said district and not inconsistent with the provisions of this act are hereby extended thereto."

And section 11 is as follows:

"That the Attorney-General is directed forthwith to compile and cause to be printed, in the English language, in pamphlet form, so much of the general laws of the United States as is applicable to the duties of the governor, attorney, judge, clerk, marshals, and commissioners appointed for said district, and shall furnish for the use of the officers of said Territory so many copies as may be needed of the laws of Oregon applicable to said district."

That Congress thought and believed that the laws of the United States, unless inapplicable, extended to Alaska, under the provisions of the said act of May 17, 1884, is further evidenced by the language in section 8 of that act expressly providing that the land laws of the United States should not be operative in Alaska. That language is as follows:

"But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

And the result has been that when Congress has wished to extend any portion of the land laws of the United States to Alaska, it has done so by specific enactment.

These various provisions are in full accord with section 1891 of the Revised Statutes of the United States, which in the case of Nagle vs. United States,

191 Fed. 141, has been held to apply in its full force and extent to Alaska.

Section 1891 of the Revised Statutes is as follows:

> "The Constitution and *all* laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States."

The decision in the Nagle case depended on whether that section extended to and applied in Alaska, so as to make operative here a certain federal statute relating to Indian citizenship. Or as the Court expresses it:

> "In this relation, it is urged that the provision contained in section 6 [of the law relating to Indian citizenship] . . . . operates to make Indians in Alaska who observe the behests of the provisions citizens, as well as Indians who reside elsewhere in the United States." (p. 143.)

The Court proceeds:

> "Whether this be so we think must depend upon whether the laws of Congress of general application have been extended to or are effective upon any constitutional or legal principle within the territorial confines of Alaska. We are of the view that the question must be answered in the affirmative."

The court arrived at that decision because it considered that said section 1891 of the Revised Stat-

utes does extend all general statutes of the United States to Alaska and makes them applicable therein. That section does not say that all *substantive* laws shall have effect in the organized territories, but that *all* laws shall.

Long before the Nagle decision was handed down Congress evinced the belief that the general laws of the United States were applicable in Alaska, for in passing the legislative, executive and judicial appropriations act in 1896 (Act of May, 28, 1896, c. 252, 29 Stat. 140), sections six to twenty-three of that act are by express provision declared not to apply to Alaska. There was no reason for inserting such a provision except the full realization by Congress that, under the general rule laid down in section 1891 of the Revised Statutes, those sections would apply to Alaska unless otherwise expressly provided.

Now, what reason, in view of these various provisions and of the decision in the Nagle case and the Humboldt case, can there be for saying that though "All laws of the United States" (to use the exact language of § 1891) are extended to Alaska, this expression means only the substantive laws and excludes the laws of procedure provided for the courts authorized to maintain the federal authority. Are not these laws or procedure as much "laws of the United States" as the substantive laws? If they are not laws of the United States, what are they?

Page vs. Burnstine.

This question is settled by the decision of the Supreme Court in Page vs. Burnstine, 102 U. S. 664, heretofore referred to. In this case it was held that

the general federal laws of procedure applied to the District of Columbia, though Congress had already provided separate courts and separate code of laws for that District. The legal status of Alaska is precisely the same as that of the District of Columbia. Congress is the sole legislative body for each. Each has been provided with a separate judiciary and a separate system of laws, and to each have the general laws been extended by identical language used in two different sections. The reasons, therefore, which impelled the Supreme Court to apply the general laws of practice to the courts of the District of Columbia must perforce lead this tribunal to the same conclusion with reference to the District of Alaska. The Page case is so conclusive on this subject that we deem it justifiable to quote from it at some length.

Referring to the question of whether or not a certain general practice provision enacted by Congress for the United States courts applied to the District of Columbia, the Court said:

> "There is still another act bearing upon the question before us. We allude to that portion of sec. 34 of the act of Feb. 21, 1871, creating a government for the District of Columbia, which declares that 'the Constitution, and all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States.' . . . . If it be true, as argued, that the Supreme Court of the District of Columbia, although organized

under and by authority of the United States, and possessing the same powers and jurisdiction as the circuit courts of the United States, was not intended to be embraced by the proviso to the third section of the appropriation act of July 2, 1864, and if, as may be further argued, the act of March 3, 1865, being, in terms amendatory only of that section, was not intended to modify the special act of the latter date relating to this District, it is, nevertheless, quite clear that, from and after the passage of the act of Feb. 21, 1871, if not before, the act of March 3, 1865, became a part of the law of evidence in this District. *The legal effect of the declaration that all the laws of the United States, not locally inapplicable, should have the same force and effect within this District as elsewhere within the United States, was to import into, or add to, the special act of July 2, 1864, relating to the law of evidence in the District, the exception, created by the act of March 3, 1865, to the general statutory rule, excluding parties as witnesses. This is manifestly so, unless it be that the statute affecting the competency of parties as witnesses in actions by or against personal representatives or guardians, in which judgment may be rendered for or against them, is 'locally inapplicable' to this District. But such a position cannot be maintained consistently with sound reason.* The same considerations of public policy which would require the enforcement of such a statute, as that of March 3, 1865, in the Circuit

and District Courts of the United States, without regard to the laws of the respective States on the same subject, would suggest its application in the administration of justice in the courts of this District." (p. 666.)

The Court then proceeded to discuss and distinguish the cases cited and relied upon by plaintiff in error in the case at bar:

IX.

THE AUTHORITIES OF PLAINTIFF IN ERROR ANALYZED.

Plaintiff in error has submitted a number of authorities which at first blush might seem to support his contentions, but upon examination it will be found that the situations passed upon by the Courts in those cases are entirely different from the situation in the case at bar.

1. All the cases cited by plaintiff in error were decided under territorial statutes entirely different from ours, viz.:

a. The Alaska Code provides, in express language as well as by implication arising from its various provisions, that it shall apply only to local or territorial crimes, and in that respect differs from the statutes under which those authorities were decided.

b. The Act creating the District Court of Alaska (March 3, 1909) confers broader jurisdiction than the Acts creating the territorial courts.

c. The old territories were given a measure of home rule and are *quasi* independent sovereigns

with a legislature authorized by Congress to enact not only substantive laws but also rules of practice for the courts.

The first two of these propositions have already been discussed. The last is discussed in the leading cases of Clinton vs. Englebrecht (13 Wall. 434), and Hornbuckle vs. Toombs, 18 Wall. 648, and the right of the territorial legislature to prescribe rules of practice is given as the reason for holding that local practice applied. This distinction between the political statute of a territory, with a local legislature, and a district without one, is noted and emphasized by the Supreme Court in Page vs. Burnstine, and the inapplicability to the courts in a district of the doctrine announced by the authorities of plaintiff in error is clearly pointed out in the following language:

> *"Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was, therefore, ruled that the territorial enactments, regulating the practice and proceedings of territorial courts, were not displaced or superseded by general statutes upon the same subject passed by Congress, in reference to 'courts of the United States.' . . . No such state of case exists here. The reasons assigned for the conclusion reached in those cases have no application to the question before us."* (p. 668.)

On this score there can be no possible distinction between the District of Columbia and the District of Alaska. If the doctrine of Clinton vs. Englebrecht and Hornbuckle vs. Toombs does not apply to the District of Columbia, it cannot apply to Alaska while reason rules in the interpretation of law.

2. The authorities of plaintiff in error deal:

a. With private civil litigation or with local territorial crimes and not with national or federal crimes, and do not in any manner affect the federal sovereignty;

b. Or with the organization of the tribunal, such as the selecting, summoning or impanelling of juries —an authority conferred upon a local territorial government—not with the remedy for the national wrong.

The only case on record from the territories where a national crime was involved is Folsom vs. United States, *supra,* and in that case it was held that section 1024, R. S., the one here under discussion, did apply, and the reason assigned was that in trying the case, which involved the violation of a general federal law, the Court exercised the jurisdiction of a United States court.

The most recent case on the subject is Hunter vs. United States, 195 Fed. 253, decided by the Circuit Court of Appeals of the Eighth Circuit last March, in which it was held:

> "Revised Statutes, section 1020, which authorizes the court in a criminal case to remit the whole or any part of the penalty of a forfeited recognizance 'whenever it appears to the court

> that there has been no wilful default of the party, and that a trial can, notwithstanding, be had in the cause,' governs in a prosecution for an offense against the United States in a territorial court, to the exclusion of a statute of the Territory."

It is true that the opinion recites that "in the trial of cases territorial courts are required to conform to the statutes and practices of the territory," but this is purely a *dictum* and in no way involved in the decision of the controversy.

It is clear that all of the cases relied upon by counsel arose under local, not national, statutes. For though some of them arose under statutes applying to the territories generally, yet statutes of this kind have no other force or effect than they would possess if enacted as separate and distinct statutes for each and every territory severally. If the mode of enactment had been by several acts, each one applying to a several territory, it would not be contended that they would be national laws. Then why are they national laws if the form of enactment be one statute applying to all the territories? Can the mere enactment in compendious or universal form, instead of as several statutes, change the essential character of such statutes? We submit that it cannot. No law, it is submitted, is national, as contra-distinguished from local, in its character unless it is nation-wide in its extent and applicability and enacted by Congress in its capacity as a national legislature as contra-distinguished from its capacity as a territorial legislature.

This feature of the law was not examined into by Judge Lyons, for the reason that he considered the language of the local statute conclusive that it applied only to local offenses, and he, therefore, accepted counsel's statement as correct, that in the territories federal offenses were prosecuted under the rules of the local procedure. But this we have shown, and shall further emphasize, is not the ruling of the courts.

Let us analyze the cases cited by plaintiff in error.

In Clinton vs. Englebrecht it appears that an ordinance of the city of Salt Lake, in the territory of Utah, provided that retail liquor dealers must take out a license before selling liquor. The plaintiffs were such dealers and failed to take out the said license, whereupon the defendants, acting under the said ordinance, destroyed the stock of liquors of the plaintiffs. A statute, which clearly must have been a statute of the territory and not a statute of the United States as a national Government, gave a right of action against any person who should willfully and maliciously destroy the goods of another, and provided for the recovery of three times the value of the property destroyed. The plaintiffs sued the defendants for such threefold value of the liquors destroyed. In ordering the issuance of a venire for a jury the Court proceeded on the theory that it was acting in that case as a court of the United States, and that it was to be governed in the selection of jurors by the act of Congress; whereas the local territorial statutes provided a method of procedure for the impanelling of the jury which was different from

that provided by said acts of Congress. This action of the Court was alleged as error, and was held to be such on appeal. Obviously it was error. The case does not support the theory of the plaintiff in error in the case at bar that in federal crimes local procedure applies. Moreover, the question raised was as to the proper method of selecting and impanelling the jury, which does not relate to the remedy, but to the organization of the tribunal.

The action in Hornbuckle vs. Toombs was likewise under a local statute, and upon a cause of action essentially local, not federal, in its character. To quote from the statement of facts:

> "Toombs brought an action against Hornbuckle in a district court of the Territory of Montana, for damages caused by the diversion of a stream of water, by which his farm was deprived of irrigation, and for an adjudication of his right to the stream, and an injunction against further diversion. The action was framed and conducted in accordance with the practice as established by the legislative assembly of the Territory." (p. 650.)

The Practice Act adopted by the legislative assembly of the territory in 1867 contained the familiar provision, common to the Practice Acts of several of the states and territories, to the effect that there should be in the territory of Montana "but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs." In behalf of Hornbuckle it was contended that the Court committed error in permitting

the joinder in one complaint of actions of an equitable and of a legal nature; Hornbuckle's counsel argued that the provisions of the practice code of the United States, adopted in 1792 (1 Stat. 276), controlled, and that therefore equitable and legal causes of action could not be joined in one complaint. The Supreme Court decided that the lower court committed no error in following the procedure prescribed by the territorial assembly. And Justice Bradley, who delivered the opinion of the Court, expressly stated that the Supreme Court did not, in the Hornbuckle case, decide what procedure should be adopted in causes arising in the territories under *national* statutes. At p. 656 he says:

> "It is true that the District Courts of the Territory are, by the organic act, invested with the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; and a portion of each term is directed to be appropriated to the trial of causes arising under the said Constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any of the regulations affecting the Circuit and District Courts of the United States, is not now the question. A large class of cases within the jurisdiction of the latter courts would not, under this clause, come in the Territorial courts; namely, those in which the jurisdiction depends on the citizenship of the parties. Cases arising under the Constitution and laws of the United States would be composed

mostly of revenue, admiralty, patent, and bankruptcy cases, *prosecutions for crimes against the United States,* and prosecutions and suits for infractions of the laws relating to civil rights under the fourteenth and fifteenth amendments. To avoid question and controversy as to the *modes of proceeding in such cases,* where not already settled by law, perhaps additional legislation would be desirable."

Good vs. Martin, 95 U. S. 90, was a suit in the District Court of Arapahoe County, Colorado Territory, upon a promissory note—clearly an action under a local statute. The trial court refused to permit certain witnesses to testify because of their interest, and such refusal was alleged as error. The Supreme Court of the United States held that the proviso of the third section of the Act of Congress approved July 2, 1864 (13 Stat. 351), to the effect that in the courts of the United States no witness shall be excluded in any civil action because he is a party to, or interested in, the issue tried, has no application in an action arising under territorial laws. This case is not an authority for the contention of the plaintiff in error in the case at bar, because it simply amounts to a denial of the proposition that practice statutes of a federal character are applicable in local territorial actions.

In Reynolds vs. United States, 98 U. S. 145, the indictment was for bigamy, in violation of section 5352 of the Revised Statutes of the United States, which reads as follows:

"Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage is absent for five successive years, and is not known to such person to be living; nor to any person by reason of any former marriage which has been dissolved by decree of a competent court; nor to any person by reason of any former marriage which has been pronounced void by decree of a competent court on the ground of nullity of the marriage contract."

As hereinbefore stated, this is in its essence and nature a local statute; and clearly under the rule for which we contend and which is supported by the decisions cited by the plaintiff in error, the local, not the national, practice was applicable to the case. The indictment was found under the territorial statute providing for a grand jury of fifteen members. The defendant Reynolds claimed that the grand jury was an illegal one, because not consisting of at least sixteen members as required in the case of federal grand juries. The trial court held that the territorial enactment governed, and the Supreme Court sustained the trial court's ruling. It is only by entirely ignoring the fundamental difference between statutes of a

local nature and those of a national or federal nature that the defendants can look upon this case as supporting their views. The fact that Congress has enacted a law does not make it a national law. A law enacted by Congress for a territory is essentially local. If the law be for all the existing territories it is still local. The very wording of the statute involved in this case: "Every person . . . . in a Territory," etc., demonstrates that it is intended to be a local rule applying only where there is no other sovereign which can make and enforce local rules. It was enacted by Congress while performing its function as a local legislature. Moreover, the question raised related only to the constitution of the tribunal and not to the remedy.

Miles vs. United States, 103 U. S. 304, is another case of indictment for bigamy, under section 5352 of the Revised Statutes of the United States. The case arose in the territory of Utah and the Supreme Court held that in impanelling the jury the trial court was bound to follow the law of the territory. What we have said of the Reynolds case applies to this one.

In United States vs. Pridgeon, *supra,* the defendant was indicted for horse-stealing committed in a certain portion of Indian Territory known as the Cherokee Outlet, which was by statute attached to one of the counties of Oklahoma Territory for judicial purposes. The case holds that though by Act of Congress of May 2, 1890 (26 Stat. 81), which created the Territory of Oklahoma out of part of the Indian Territory, the Criminal Code of Nebraska was adopted and put in force in the Territory of Oklahoma, yet

the crime charged against Pridgeon, having occurred outside of the territorial limits of Oklahoma, and within the Indian country, was punishable under the Act of Congress of February 15, 1888, relating to horse-stealing in the Indian country. There was no question before the court as to whether the local practice of Oklahoma Territory or the federal practice should be followed in the case. Apparently the court assumes throughout the opinion that the federal practice should be followed, for on pages 56 and 57 of the opinion we find the following:

> "It admits of no question that under these provisions the District Court for the First Judicial District within and for Logan County, Oklahoma Territory and for the Indian country attached thereto for judicial purposes, sitting as a District Court of the United States, had jurisdiction of offenses committed against the laws of the United States in the Cherokee Outlet, which by the statute and the action of the Supreme Court was attached to Logan County, Oklahoma, for judicial purposes. It is equally clear in respect to the Cherokee Outlet so attached to Logan County, that it was at the passage of the Act of May 2, 1890, and continued to be, Indian country, coming within the provisions of the Act of February 15, 1888, and that the offense of horse-stealing committed therein on November 4 and 12, 1890, was an offense against the United States."

The defendant was sentenced to imprisonment at hard labor for a term of five years, and the federal statute of February 15, 1888, under which the prose-

cution was had, simply provided that one convicted of the crime of horse-stealing in Indian Territory "shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than fifteen years, or by both such fine and imprisonment, at the discretion of the court." The contention was made in behalf of the defendant that the sentence was void because it imposed hard labor, whereas the statute made no provision for sentencing the defendant to hard labor. In discussing this question the Supreme Court clearly indicates that it considered the federal statute applicable to the question of how and for what term the defendant could be sentenced. There is not one word in the whole opinion which in any measure whatsoever supports the contention of the plaintiff in error in the case at bar, that the territorial practice should be applied in federal cases. Not only was the substantive law of the federal statutes applied in this case, but so far as the opinion itself discloses the federal objective law was likewise applied thereto. For on page 49 in the opinion of Justice Jackson it is stated:

> "At the September term, 1890, of the District Court for the First Judicial District of Logan County, Oklahoma Territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a District Court of the United States of America, the appellee, Sidney S. Pridgeon, was regularly indicted for horse-stealing by the grand jurors of the United States of America, within and for Logan County and that part of the Indian country attached

thereto for judicial purposes, *after having been first duly sworn, impaneled, and charged to inquire of offenses against the laws of the United States committed therein.*"

In the case of Thiede vs. Utah Territory, 159 U. S. 510, the plaintiff in error was found guilty by the trial court of the crime of murder alleged to have been committed in said territory. He complained, on appeal, that he had not been furnished two days before trial with a copy of the indictment and a list of the witnesses to be produced on the trial; he contended that section 1033 of the Revised Statutes of the United States, requiring such copy and list to be furnished to an accused in a capital case, was applicable to his case. This was clearly an offense under the local laws of the Territory of Utah, not under the national laws, and the Supreme Court of the United States held that he was therefore not entitled to the benefit of the provisions of said section 1033.

The case of Jackson vs. United States, 102 Fed. 473, which arose in the territory of Alaska, holds simply that in a prosecution for assault with a dangerous weapon, in violation of a local statute, the local law in regard to grounds for challenge of grand jurors is applicable.

The action of Corbus vs. Leonhardt, 114 Fed. 10, was brought in the territory of Alaska for the recovery of a sum of money for medical services, and the question arose whether the doctor who had rendered the services could testify after the decease of his patient in regard to transactions and conversa-

tions between himself and said patient. It was argued in behalf of the personal representative of the patient that the provisions of section 858 of the Revised Statutes of the United States providing that in actions by or against executors, administrators or guardians neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, applied to the case; and on appeal the refusal by the trial court so to apply it was alleged as error. The Circuit Court of Appeals for the Ninth Circuit held that said section of the Revised Statutes was not applicable. The cause of action in this case was clearly of a local nature, and therefore the decision is not an authority for the position of the plaintiff in error in the pending case. The case, however, so far as concerns this point, is ill-considered, for it proceeds upon the theory that it is not in conflict with Page vs. Burnstine, *supra,* which we have already considered, whereas it is in direct conflict with the Page case. The Court says, referring to the Page case:

> "That decision was rendered under certain provisions of the act providing a government for the District of Columbia, which are not applicable to Alaska." (p. 12.)

The facts were that notwithstanding the District of Columbia had a law of evidence, provided by Congress, the same as Alaska has its law of evidence, the Supreme Court held that section 858 of the Revised Statutes applied under the statute extending all laws of the United States to the District of Columbia

which were not locally inapplicable. The provisions of section 858 were and are no more "locally inapplicable" to Alaska than they are to the District of Columbia, and we have a statute extending all laws of the United States, not locally inapplicable, to Alaska, namely, section 1891 of the Revised Statutes. If the Page case was rightly decided, we submit that the Corbus case is, on this point, wrongly decided. The Court failed to note the reasons upon which the decision in the Page case was based, namely, that the territories had a local legislature authorized to enact local rules of practice while neither the District of Columbia nor Alaska has.

The conflict of the Page case with that of Corbus vs. Leonhardt is irreconcilable and manifest. In both the actions were upon contracts and were of a local nature, and in both the question arose as to whether testimony of conversations with a deceased person could be given against his personal representative or whether such testimony was rendered inadmissible by section 858 of the Revised Statutes, and both cases arose in districts of the United States which have no local legislatures and for which Congress acts as a legislature; it appears to us that if section 858 was applicable in the Page case, it was applicable in the Corbus case. And the principle applied in the case of Nagle vs. United States, 191 Fed. 141, recently decided by the same court which decided the Corbus case, namely, that section 1891 of the Revised Statutes extends *all* general federal laws to Alaska, certainly involves the overthrow of the Corbus decision.

The prosecution of Cochran vs. United States, 147 Fed. 206, was for larceny of personal goods within an Indian reservation situated within the limits of the Territory of Oklahoma. The Circuit Court of Appeals for the Eighth Circuit considered the question now under discussion foreclosed by the decisions of the Supreme Court of the United States in the cases already analyzed, namely, Reynolds vs. United States, Miles vs. United States, Clinton vs. Englebrecht, Hornbuckle vs. Toombs, and Good vs. Martin; and therefore did not, so far as the opinion discloses, enter upon a detailed or careful consideration of the point now in controversy in the pending case. The question, then, is whether said previous decisions did decide the point. We think it must be clear from the foregoing analysis and from what we have said in regard to the case of Page vs. Burnstine that so far from it being true that this point was decided in those cases, the opinions therein disclose that the subject matter of those cases was of a local nature. The same is true of the Cochran case. It deals with a local not with a federal offense.

In Welty vs. U. S., 76 Pac. 122, it was decided by the Supreme Court of Oklahoma that in prosecutions for murder under a law enacted by Congress in its capacity as a territorial legislature the local procedure applied. The Court considered that question foreclosed by Hornbuckle vs. Toombs, Reynolds vs. U. S., and Thiede vs. Utah.

What has been said about most of the previous cases may be said about the case of Fitzpatrick vs. United States, quoted by counsel. This, too, was a

prosecution under a local territorial statute, and the offense involved was in no sense a federal crime, nor did the procedure in that case conflict with any federal law.

Kie vs. United States, 27 Fed. 351, affords the plaintiff in error some comfort because, as counsel says, the Court held that the question of the qualification of jurors must be determined by the law of Oregon. As has already been seen, Judge Deady, in that decision held that the federal laws of procedure applied. When he held that the law of Oregon applied to the qualification of the jurors it was due to the fact that the federal statutes provided that the qualifications of jurors shall be determined by the qualifications fixed by the law in the respective jurisdictions in which they are drawn, and that Alaska has no other law than the law of Oregon on the subject, and, therefore, the latter applied. Here is what the Court said on that subject:

> "But the question of who is qualified to serve as a juror in the district court of Alaska must be answered by the law of Oregon. Section 800 of the Revised Statutes which declares that jurors in the national courts shall have the qualifications prescribed by the law of the state in which they sit, cannot apply, for there is no law of Alaska on the subject, unless it be the law of Oregon; and in either case it follows that the qualifications of jurors in Alaska, and the liability of persons to serve as such, must be determined by reference to this law."

However, there is nothing in that case to show how

that particular jury was drawn.

United States vs. Ball was a prosecution for murder under the Alaska Code, and that is all there is of that case.

X.

THE COURTS OF ALASKA ARE COURTS OF THE UNITED STATES.

It is argued that section 1024, R. S., applies only to "courts of the United States," that the District Court of Alaska cannot be properly termed a court of the United States, and that, therefore, the section in question does not apply to the latter. This reasoning is based upon fallacious premises. In the first place, it will be observed that section 1024 is not by its terms limited to any particular court but is as general in its scope as it is possible to make it. And, in the second place, in contemplation of the practice provisions of the federal laws, the District Court of Alaska is a court of the United States though it may not be what is termed a "constitutional court" or a court of the United States in contemplation of the tenure of office act. The authorities are uniform that a territorial court in its exercise of jurisdiction over federal cases is a court of the United States in contemplation of the provisions prescribing the practice in federal cases.

Embry vs. Palmer, 107 U. S. 3 (9).

Price vs. M'Carty, 89 Fed. 84.

U. S. vs. Haskins, 3 Saw. 262, 26 Fed. Cas. No. 15,322.

Kie vs. U. S., *supra.*

In the first of these cases it was held that the Su-

preme Court of the District of Columbia is a court of the United States in contemplation of section 709, R. S., Justice Matthews delivering the opinion of the court, saying:

> "The judgment, which is the subject matter of the litigation, is that of the Supreme Court of the District of Columbia, *which is a court of the United States.*"

In Price vs. M'Carty, *supra*, the Circuit Court of Appeals for the Second Circuit held that the District Court of the District of Columbia is a court of the United States in contemplation of the provisions of section 1014. That section provides:

> "For any crime or offense against the United States, the offender may, by any justice or judge of the United States . . . . be arrested and imprisoned, or bailed, as the case may be, for trial before such *court of the United States* as by law has cognizance of the offense."

In the contemplation of this statute it has, of course, been uniformly held that any Court which has jurisdiction over offenses against the United States is a court of the United States. In United States vs. Haskins, *supra*, it is said:

> "It appears to me that, although the district courts of Utah are not courts of the United States, as defined in Clinton vs. Englebrecht (*supra*), they are in another sense not improperly styled courts of the United States as being organized by that government under the authority to make needful regulations for the territories. They are spoken of as such in acts of

Congress and in opinions of the supreme court. Thus, in Hunt vs. Palao, 4 How. (45 U. S.) 589, the territorial court of Florida is spoken of as a court of the United States, in contradistinction to a state court, and in Clinton vs. Englebrecht the court speak of these courts as acting, in cases arising under the constitution and laws of the United States, 'as circuit and district courts of the United States.' "

As section 1014 is so closely associated with the provisions of the subsequent sections touching practice in federal criminal prosecutions, reason would dictate that the same construction which is given to the term "U. S. court" in one is equally applicable in the other, and if a section which by its own terms is confined to United States courts be construed to be operative in all courts exercising *United States* jurisdiction, it would seem a most arbitrary and unreasonable exercise of judicial power to hold that section 1024, which also relates to the same subject of criminal prosecutions but which is not in its terms limited to any special tribunal, is, nevertheless, confined in its operations to the "constitutional courts" of the United States. By the Act of March 3, 1909, the District Court of Alaska has been given the same jurisdiction as Circuit and District Courts of the United States. The extension of this authority was for the purpose of giving it jurisdiction of crimes committed on the high seas as well as over crimes committed within the territorial limits of the District of Alaska.

U. S. vs. Newth, 149 Fed. 302.

The question in this case is not one of terminology, but one of reason. It is not material to decide whether we should call the courts of Alaska courts of the United States or not, but it is material to determine whether the court of Alaska can be required to discharge the functions of the United States Circuit and District Courts without permitting it to employ the same instrumentalities of procedure devised for the former, it being the contention of the Government that these instrumentalities were devised by Congress as the means of enforcing federal authority in every court charged with that duty.

It has already been shown that Kie vs. United States and Page vs. Burnstine strongly support the position here taken by the Government.

XI.

HISTORY OF SECTION 1024.

The most irrefragable argument in support of the proposition that section 1024 applies to Alaska is afforded by the history of that section. Counsel has anticipated the Government's contention on this point by devoting a very and unreasonably large portion of his brief to an apparent attempt at covering up the most notable features of that history. He admits that this section originated as a part of the law enacted in 1853 fixing the fees for officers of the United States Circuit and District Courts. This, then, is undisputed; but it must also be admitted that the embryo of section 1024 and other general provisions governing practice were included in the Act of 1853, in part for the purpose of preventing the officers from en-

hancing their fees by instituting separate proceedings for causes which ought to be joined. It does not follow, as counsel argues, however, that these general provisions relating to procedure have no force and effect apart from their connection with or relation to the fee bill. They have a general and independent effect apart from their uses in measuring the legality of fees, as may readily be ascertained by examining the numerous decisions under section 1024.

Counsel argues that inasmuch as Congress subsequently, by special enactments, extended the fee system to some of the territories, this circumstance is evidence that Congress did not consider any part of the act to apply to those jurisdictions in absence of specific provisions to that effect. This method of reasoning was employed without avail by the United States attorney before this court in Nagel vs. United States, *supra,* when it was urged by defendant in error that inasmuch as the law of 1887 there involved was an elaborate provision for the care of Indians in the States alone, one clause in one section of that law could not be construed to be applicable to Indians in Alaska simply because that clause was general in its terms. This court, however, in that case had no hesitancy in declaring that particular proviso to be general in its application, though it was a part of an enactment which was otherwise special in its application.

It is, of course, clear that the Act of 1853, in so far as it relates to the fees and costs to be allowed the officers of the Circuit and District Courts of the United States, cannot apply to the territories, for the

simple reason that in the territories there are no Circuit and District Courts of the United States, and for the further reason that there is no general law fixing remuneration for all officers irrespective of where they serve. The remuneration of officers differs in the different districts of the United States.

We may here disregard what counsel says concerning the time when the fee bill enacted in 1853 was extended to the territories and point to the fact that section 1883, R. S., extends that schedule of fees to all territories. It will be noticed that sections 1880 to 1882, R. S., fix the annual salaries of the court officers, then, as the supplement follows, sec. 1883, which reads:

> "The fees and costs to be allowed to the United States attorneys and marshals, to the clerks of the supreme and district courts, and to jurors, witnesses, commissioners, and printers, in the Territories of the United States shall be the same for similar services by such persons as prescribed in chapter sixteen, Title 'The Judiciary,' and no other compensation shall be taxed or allowed."

Chapter 16, "Title Judiciary," is this very fee schedule from the law of 1853. The other sections from that law, including section 1024, had become absorbed in the general provisions of chapter 18 of the same title.

Toward the close of his dissertation on the history of section 1024, and on page 17 of his brief counsel makes this assertion:

> "When the first organic Act was passed for Alaska (the Act of May 17, 1884), the Act of February 26, 1853 was *not* extended to the District of Alaska."

This is all quite true with the exception of the innocent word, "not."

Section 9 of the Act of 1884 provides as follows:

> "The governor, attorney, judge, marshal, clerk and commissioner * * * they shall severally receive the fees of office established by law for the several offices, the duties of which have hereby been conferred upon them *as the same are determined and allowed in respect to similar officers under the laws of the United States,* which fees shall be reported to the Attorney General and paid into the treasury of the United States."

Now, what law is referred to in the expression "established by law for the several offices," and "allowed in respect to similar officers under the law of the United States," if it is not the law of February 26, 1853, later known as chapter 16, title "The Judiciary" of the R. S., and more especially referred to in section 823.

It is perfectly apparent that the law of 1853 *was* extended to Alaska.

Section 823, R. S., is very clearly but a summary statement of the force and effect of the fee provisions of the Act of 1853 and the various other enactments mentioned by counsel's brief touching this subject. Counsel will probably argue that though section 823, R. S., incontrovertibly applies to Alaska and has been

in force and effect there ever since May 17, 1884, yet it required a special enactment to make it applicable. This contention has already been answered by showing that the fee sections in the original law were special in both their terms and practical application, while the other sections were general. But in addition to this it must be observed that section 9, in addition to saying that chapter 16 applies, provides also for the disposition of the fees collected thereunder, which latter proviso is the new feature of the law and undoubtedly accounts for the appearance of the former in section 9, as otherwise the subsequent clause in that same section, as well as section 1891, R. S., would be sufficient to make section 823 operative in Alaska.

But, and here is a most conclusive argument in support of the Government's position, how are we to determine how the fees established by 823 are to be applied and counted except in the light of the provisions set out in sections 921, 977, 980, 982 and 1024, R. S.?

These sections were embodied in our laws from time to time chiefly, and some of them solely, as a guide to the officers in collecting their fees, and as a measure by which the legality of those fees could be settled. We have already referred to most of them in chapter V of this brief and shall let that suffice.

As far as 1024 is concerned, it was said by Judge Taft in United States v. Scott, 74 Fed., that it is simply a re-enactment of the common law already applicable to federal criminal cases. It was evidently inserted in the Act of 1853 for the purpose of

putting the rules of the common law into more clear and explicit terms so as to afford the officers of the court no excuse for collecting excessive fees by instituting a multiplicity of suits when counts should have been joined. It now seems inconceivable that Congress intended to extend the fee system to Alaska without at the same time safeguarding that system by the sections of the Revised Statutes above referred to as having been enacted largely for that purpose. In fact, section 823 is inexplicable except when read in the light of sections 921, 977, 980, 982, and 1024. When, therefore, Congress did not refer to those sections when extending the fee system to the territories by section 1883, R. S., or section 9 of Act of 1887, it must be because it regarded those general practice provisions applicable by reason of the force of the various sections extending the general laws to Alaska.

We submit, therefore, that the history of section 1024 is an incontrovertible argument in support of the proposition that that section applies to Alaska.

XII.

THE QUESTION IS (1) TECHNICAL, NOT SUBSTANTIAL, AND (2) WAIVED BY FAILURE TO STAND TRIAL.

The question as to whether section 1024, R. S., applies to the case at bar is, in the form in which it is raised, purely technical, and does not affect the substantial rights of the plaintiff in error:

1. By section 218, Part I, of the code here in question, "the common law of England as adopted and understood in the United States shall be in force in

said District (Alaska), except as modified by this Act."

At common law several indictments against the same person relating to the same subject may be consolidated for the purpose of the trial.

Commonwealth vs. Rosenthal (Mass.), 97 N. E. 609. Insurance Co. v. Hillman, 145 U. S. 285

By virtue of the aforementioned section 218, this rule obtains in Alaska. Therefore, even though separate indictments had been found for each of the fifty-six counts here involved, such indictments could and should have been consolidated for the purpose of the trial. In fact, such consolidation is made obligatory by section 980, R. S., quoted in chapter V of this brief. If such course had been adopted by the prosecution instead of consolidating the various counts in one and the same indictment, the plaintiff in error would have been in no better position to defend himself. And even if the prosecution had not requested a consolidation of the various separate indictments, the plaintiff in error would have had the right to demand such consolidation to save himself against the annoyance of a multiplicity of trials.

Dolan vs. U. S., 133 Fed. 440 (446).

Pointer vs. U. S., 151 U. S. 396 (400).

By consolidating the counts instead of consolidating the indictments, the position of plaintiff in error has in no way been changed. The distinction he urges is purely technical, not real. If error there was, it was harmless error.

2. The plaintiff in error chose not to risk his case upon a trial. The judgment entered is substantially

the same as a judgment entered on a plea of *nolo contendere,* which is recognized by the federal courts and is tantamount to a plea of guilty.

U. S. vs. Lair, 195 Fed. 47 (152).

U. S. vs. Stone, 197 Fed. 483.

This plea is evidently quite popular in the east, for in a speech delivered by his Excellency, the Attorney General of the United States, at Milwaukee, Wisconsin, February 19, 1912, it was stated with reference to certain criminal prosecutions under discussion:

> "Demurrers were sustained to four of the indictments; pleas of *nolo contendere* (the equivalent of a plea of guilty) entered to eleven of the indictments, involving eighty or more defendants."

The history of the judgment is set out in the judgment itself, and is as follows:

The defendant below demurred, which is equivalent to an admission of the truth of the allegations.

Beal's Criminal Pl. Pr., § 60, p. 53.

But the demurrer was overruled, and if the local code prevailed, he was at liberty either to plead not guilty or have judgment entered upon the demurrer under the terms of section 97, Part II, of the Alaska Code. He chose the latter course, over the protest of the prosecution, the latter claiming that said section 97 did not apply; that, on the contrary, section 1032, R. S., applied. The Court overruled the Government's objection, holding that, under a demurrer, the defendant below could waive a plea and trial,

under the doctrine of Diaz vs. U. S., 223 U. S. 442, and have judgment entered under section 97, or as at common law, if he so desired. This was accordingly done. When, before sentence, the prisoner was asked if he had anything to say why sentence should not be pronounced upon him, he answered that he had not, except that he wished to test the validity of his demurrer (pp. 181 and 183).

There can be no substantial difference between this and the common-law plea of *nolo contendere,* which latter, as before stated, is tantamount to a plea of guilty. The distinction between the proceedings had and the formal plea of *nolo contendere,* or even a plea of guilty, is based upon purely scholastic arguments which should have no weight with the Court in this age of practical common sense.

If, now, the formal plea of guilty or the formal plea of *nolo contendere* had been entered, all objections to the indictment except the general one that it did not state facts sufficient to constitute a crime would have been waived. The law requiring the indictment to accord with certain technical forms is for the purpose of enabling the defendant to defend himself. But where he states that he has no defense and desires to submit none, or even to hear the evidence against him, he is not in a position to complain that he was jeopardized in his defense by reason of technical defects in the indictment. Surely, measured by the rule of reason, if he is not willing to defend or even to deny his guilt, he cannot be heard to complain that he was not afforded that opportunity to properly defend which the law guarantees

him. Only where he denies his guilt and was put to his trial can such objection be urged after judgment. The defendant below having in his general demurrer admitted his guilt, having afterward never denied it, but asked for judgment without trial, he has waived his objection to all technical defects in the indictment.

Moreover, the charge that the indictment was duplicitous, if well founded, could have been obviated by the prosecution electing to go to trial on only one count and dismissing the others.

1 Bishop's Cr. Pr. § 451 et seq.

U. S. vs. Eastman, 132 Fed. 551 (555).

For aught defendant below knows, the prosecution might have elected to try only one count; or defendant might have been acquitted on all. In either case he would not have been injured by the alleged technical defects in the indictment.

The principle runs through all jurisprudence, both civil and criminal, that no one can take advantage of a technical defect unless it results disastrously to himself; in other words, the error must enter into the judgment.

Were the rule otherwise any litigant could withdraw during the middle of a trial after an adverse, erroneous ruling, let the case go against him, then appeal and claim the right to start over anew, though had he stayed in the trial until its close, judgment might have been rendered in his favor in spite of the erroneous ruling. The contention that a litigant may idly stand by and see judgment entered against him simply because some technical question not going

to the merits of the case was erroneously decided against him is at variance with the elementary principle of jurisprudence that no case will be reversed nor even a new trial granted except for some error which had actually resulted in some injury to the complaining litigant and which injury could be obviated on a new trial.

On the point as to whether or not duplicity is cured by the verdict, Bishop says:

> "In matter of principle, it (duplicity) would seem to be a defect of such mere form as ought to be deemed cured by the verdict, because the objection is one which relates simply to the convenience of the defendant in making his defense."
>
> 1 Bishop's Criminal Practice, § 443.

Wharton says:

> "Duplicity in criminal case may be objected to * * * ; but it is extremely doubtful if it can be made the subject of a motion in arrest of judgment, or of a writ of error, and it is cured by a verdict of guilty as to one of the offenses, and not guilty as to the other."
>
> 1 Wharton's Criminal Law, § 395.

So, also, on the same principle,

> "where there is a misjoinder of counts in an indictment, and a conviction on one only, there is no error."
>
> Reed vs. State, 46 N. E. 135.

We submit, that until plaintiff in error has shown that he has given the lower court opportunity to cure

the error, by a verdict or otherwise, he is not in position to complain in this court.

State vs. Davis, 140 S. W. 902.

State vs. Morris, 114 Pa. 476.

In a comparatively recent decision by the Supreme Court, Royal Insurance Company vs. Miller, 199 U. S. 353, the syllabus correctly states the principle pronounced by the opinion as follows:

> "Error committed by the trial court either in admitting evidence or in the legal effect given to the evidence admitted concerning acts which were held adequate to interrupt the course of prescription is not ground for reversal, where the appellate court decides that a longer period of prescription controlled, concerning which the acts of interruption were wholly irrelevant, although the defeated party, *relying on the certainty of a reversal because of such errors, may have neglected to make a full defense, or to assign other substantial errors in the appellate court.*"

As an illustration may be referred to the familiar rule that where evidence is erroneously excluded on any issue and that issue be subsequently decided in favor of the party who offered the evidence there is no cause for complaint on appeal, though the party in question ultimately lost the case. So, also, where a challenge to a juror is erroneously overruled, and the party challenging him has a peremptory challenge remaining unused, or where the verdict is favorable, the error is treated as harmless. So, again, where evidence is erroneously admitted because incompe-

tent, but subsequently other evidence be introduced by cross-examination, or otherwise rendering the former competent, the erroneous ruling becomes harmless. As further illustration of the same general proposition may be referred to the cases holding that orders erroneously granting or denying motions to correct or amend pleading become harmless errors where during the trial, or even after the trial and by the ultimate determination of the case, the feature of the pleading involved in the motion becomes eliminated.

Lloyd vs. Preston, 146 U. S. 639.

Home Life Insurance Company vs. Fisher, 188 U. S. 726.

In the first of these two cases the Court held that where there was no evidence to support allegations of an answer, defendant was not injured by the order of the Court striking them out, even if the order of the Court was irregular. The Court said:

> "But it is plain that the Court treated those allegations as before it, applied the evidence to them, and held that they were not sustained; so that, even if the course of the court was somewhat irregular, in striking out the allegations, and in afterward passing upon them and the evidence offered to support them, the defendants were not thereby injured."

If counsel's theory be correct, the defendant had a right to withdraw from the trial after the Court's ruling upon the allegations in the answer, stand by and see judgment entered against them, and then take an appeal alleging error in striking the allega-

tions in question from the answer.

The reason for this doctrine here contended for is that the ultimate judgment was not affected by the error.

It cannot be said that the alleged error entered into the judgment in the case at bar, for the rule is well settled that where there is a conviction on several counts in the same indictment and there are separate sentences running concurrently, and there is error in any or all counts except one, the error is harmless, as it does not affect the ultimate result.

Harvey vs. U. S., 159 Fed. 419.

See, also, 27 Century Digest, pg. 955.

XIII.

TRIAL BY JURY WAIVED.

Throughout his brief counsel dwells with persistent emphasis upon the injustice perpetrated upon plaintiff in error by the lower court in sentencing him without a trial. The proceedings in this case are sufficiently unusual to be startling when presented in company with the fashionable complaint of steam-rolling, and the psychological possibilities of the situation has not been overlooked in the effort to arouse the suspicion as well as the sympathy of this Court.

Before judgment is passed upon the lower court by this tribunal let us examine the proceedings leading up to the final judgment, some of which having already been referred to in the preceding chapter.

The defendant below entered a general (as well as several special) demurrer to the indictment. This was submitted, without argument, and immediately

overruled (pg. 143). Three or four months later another case came up before the same court in which the question of the applicability of section 1024 arose, was argued and ruled upon specifically.

This evidently gave plaintiff in error the first idea that there might be something in the point and more than four months after the original demurrer had been submitted *pro forma* and overruled he asked leave to resubmit it so as to have the records represent it as having been argued and ruled on in this case (pg. 163).

The prosecution then asked that defendant below enter his plea. This he refused to do, but demanded as his right that he be sentenced under the provisions of section 97, Part II, Alaska Code (pp. 172, 181, 183 and 184).

Against this course the Government protested, claiming that sections 1026 and 1032, R. S., applied (pp. 172, 181, 183 and 184). An argument followed in which the persuasive eloquence of counsel for plaintiff in error prevailed, and he now comes before this court insisting that he purposely and willfully deceived and misled the lower court into committing the error of ruling in his favor and that for this deceit he is entitled to be rewarded by this tribunal (see last page Appendix B), alleging in palliation that it was the only way by which he could save himself from being unjustly dealt with by the lower court. (See last paragraph, pg. 73, brief of plaintiff in error.)

While it may not be an unusual stunt for a limited class of lawyers to deliberately mislead the court into committing errors for the purpose of gaining

time by appeal and reversal, and, by the delay thus gained, ultimate victory, the aristocratic practitioner of that ilk has generally consented to have his name left off the brief in the appellate tribunal. But the case at bar outclasses the classiest encountered in the books where generations of jurists of unusual proclivities have left their tracks. In the case at bar counsel for plaintiff in error not only admits he has deceived the Court, but that he deceived it into making a ruling favorable to his client, alleges error based upon the solicited ruling, and with bewitching innocence comes into this court personally and claims his reward, unwilling apparently to share with others the plaudits of the public for trapping tribunals of justice.

The first objection to be made to the validity of counsel's contention that he is entitled to a reversal of this case because he succeeded in misleading the court into making a favorable ruling is the fact that he has no exception and no assignment of error raising the question as to the soundness of the Court's ruling in the premises. He has a *general* exception to the judgment, but that exception does not point out any specific error in the ruling. Counsel will undoubtedly argue that in a case of this kind this tribunal should waive specific exceptions as inexpedient and tending to awaken a trial court to the fact that it is being imposed upon.

The same will be contended for the absence of an assignment of error. In this case the assignment of errors and application for a writ of error were filed the very day and moment the sentence was passed and judgment entered. Had counsel alleged

error upon the favorable ruling complained of in his brief, he might even at that late hour have apprised the court of the pit "digged" and afforded his Honor an opportunity to correct the error, as any Court can correct its own judgments during the same term in which they are entered. Under the circumstances it will, no doubt, be argued that in cases of this character specific assignments of error should be waived by this Court as an unreasonable restraint upon the profession.

Nothing further will, therefore, be said on this point.

There are other reasons, however, which suggest themselves as sufficient to meet counsel's attack upon the judgment. Some of them have been set out in the preceding chapter; others will follow.

At common law a general demurrer to an indictment was taken conclusively as an admission of the truth of the allegations, and if it was overruled, judgment was entered against the defendant.

1 Bishop's Criminal Practice, § 782 et seq.

Beal's Criminal Practice, § 60, pg. 53.

Professor Beal says:

> "If a demurrer is overruled, the defendant has no right to plead over: final judgment is given against him, whether the offense is felony or misdemeanor. The Court may, however, in its discretion give him leave to withdraw the demurrer and enter a plea; and the absolute right to do this is commonly extended to defendants by statute."

Bishop quotes Hale as saying:

"If the defendant will demur, and it be judged against him, he shall have judgment to be hanged."

This was the law of the land at the time the Constitution of the United States was adopted, and in the light of that fact the 6th amendment, which counsel appeals to, must be construed. The Constitution was but a confirmation of the common-law right at the time.

While it is true that the Supreme Court has held that a defendant in a felony case could not deny his guilt and at the same time waive trial by jury, it is doubtful if that ruling will be adhered to after the decision in the Diaz case, as in the latter the Court seems to have abandoned as antiquated the scholasticism which governed its former decision referred to by counsel. However that may be, it is certain that no Court has ever held that a defendant in a misdemeanor case cannot waive a jury. And the charge here is a misdemeanor.

Tyler vs. U. S., 106 Fed. 137.
Jewett vs. U. S., 100 Fed. 832.
Richardson vs. U. S., 181 Fed. 1.
U. S. vs. Hillegass, 176 Fed. 444.

Nor has any Court held that a defendant may not waive a jury by a plea of guilty or *nolo contendere.*

Nor has any Court ever held that a defendant even in a felony charge, who enters a general demurrer, but who refuses to withdraw his demurrer or plead over, or even deny his guilt after the demurrer is overruled, must yet be forced to stand trial before a jury. Such proceeding would seem like an unneces-

sary torture of defendant, for by his demurrer he says in substance and effect that if the facts charged in the indictment constitute a crime, he is guilty as charged.

Section 1026, R. S., does not say that defendant after the demurrer is overruled shall be tried, but extends to him the privilege of a trial and assumes that he will avail himself of that privilege.

In this case he refused to accept the offer of a trial, and under the doctrine of United States vs. Diaz, *supra,* the Court held that such offer was a personal privilege extended to him for his own benefit, which he might accept or reject at his pleasure.

The only change in the common law effected by the statute is to give defendant the right to plead over, whereas at common law it was discretionary for the Court to let him do so.

In view of counsel's candor in this case there is some reason for supposing that he will point to the objection of the prosecuting attorney to the proceeding of sentencing defendant below without a trial as persuasive, if not conclusive, evidence that the Court was in error.

This contention as a general proposition, under ordinary circumstances, the Government in the case at bar is not interested in combating. But, it may be pointed out that under the peculiar circumstances of this case it is quite self-evident that the position taken by the prosecuting attorney is only evidence that he is a cautious practitioner desirous of avoiding any question about which even the most frivolous could raise a controversy.

Reverting to the statement that the offenses denounced by section 5209, R. S., are misdemeanors and not felonies, it becomes necessary to add that counsel most likely will now, as he has done heretofore, contend that the New Penal Code changes the grade of these offenses to felonies.

Section 5209, R. S., specifically declares the offenses therein denounced to be misdemeanors. Section 335 of the New Penal Code declares any offense punishable by imprisonment for more than one year a felony. And it has been suggested that this section of the New Penal Code also applies to and amends section 5209, R. S. It will be discovered, however, that section 5209 is not referred to in the New Federal Penal Code and is not embraced within it. As was said by the compilers of the new code, it was "not intended to include in the revision any of the statutory crimes having penal provisions not properly separable from the administrative provisions." The land laws, the customs laws, the banking laws, transportation laws, the pure-food laws, etc., all belong to this class, and neither is included in nor superseded by the Penal Code. These administrative laws with penal provisions are compiled and annotated as the appendix to the Federal Penal Code annotated by George F. Tucker and Charles W. Blood and published by Little, Brown and Company, and now in common use. In the annotations of this work, under section 5209, on page 385, it is stated, giving the authorities, that the offenses defined by this section are misdemeanors, thus clearly intimating that the grade of the offense has not been changed. Section 341 of

the Penal Code proceeds to enumerate the various sections which the code is intended to repeal, and in addition thereto recites at length the various parts of such other sections as it is designed to supersede or amend. It is argued that the last paragraph of section 341 repeals portions of section 5209. This paragraph reads as follows:

> "Also all other sections and parts of sections of the Revised Statutes and Acts and parts of Acts of Congress, in so far as embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed."

As was said by the Supreme Court in Johnson vs. United States, decided June 7, 1912, discussing the question of whether or not this code amended certain provisions of the Penal Code of the District of Columbia:

> "Of course what was embraced within *and* superseded by the criminal code is repealed by it, but we have to consider, as we have considered, whether the provision of the District Code in regard to the punishment of murder were embraced within the criminal code and the discussion answers as well the contention based on section 1639 . . . . and as said by the Court of Appeals, a cogent reason for the conclusion that they were intended to exist together is found in the repealing provision of the Criminal Code, which in chapter 15 enumerates in detail the

provisions repealed and no reference is made to the District code."

In view of the care with which the framers of the new code have enumerated the various sections and parts of sections to be superseded or repealed, it is strange that nowhere is any reference made to any of the administrative laws above enumerated, which, if counsel's theory be correct, are nearly all, nevertheless, amended by the code. The reasonable construction to be given to section 335 is that it applies only to the offenses denounced by the code of which it is a part. It will be observed that in this new compilation those parts of the various sections touching the grade of the offense have all been eliminated and the parts touching the place and nature of imprisonment have all been amended so as to only provide for "imprisonment" without specifying jail or penitentiary or hard labor as penalties. Sections 335 and 338, therefore, became necessary to make the new code complete, but that reason for their existence applies only to the new code and not to the old enactments.

XIV.

CONCLUSION.

It has been shown conclusively that Congress had good substantial reasons for retaining the federal procedure for federal cases in Alaska, and that therefore the language employed in sections 1 and 10 of the Alaska Practice Code, as well as in the enacting clauses, was used advisedly, intelligently, and purposely, and that it is not the result either of ignorance or accident, as counsel would have it appear.

It is evident that without the use of the federal procedure many federal laws cannot be enforced at all, while the enforcement of others will be so hampered as to render them almost futile. To the latter class of laws belong especially the administrative laws with penal provisions, none of which have been embodied in the New Penal Code, because on account of their peculiar construction their penal clauses cannot well be separated from the body of the purely administrative parts of them.

But in addition thereto it has become apparent that Congress has drafted its administrative and penal laws with a view to their enforcement through the medium of the federal procedure, and, therefore, even in the absence of specific language of the Alaska Code to the contrary, the latter's application to federal offenses could not be sustained.

This case has a far deeper significance to Alaska than the result of this one judgment. The interstate commerce laws are now for the first time being enforced in the territory. So is the Sherman law. So is the bankruptcy law. Several indictments are pending under each in Alaska courts, and, as far as known, the provisions of section 1024 have been taken advantage of by the Government in all. In this the old practice of the Alaska courts has been followed. Though no case has gone to the Appellate Court raising the exact question here involved, that the practice has been usual cannot be disputed. One example may serve as an illustration. As early as 1902 one Idleman, a United States Customs Collector at Eagle, on the Yukon, was indicted in six separate

indictments, some of which contained several counts. These indictments were all consolidated by Judge Wickersham, under the provisions of section 1024. The first trial resulted in a disagreement of the jury. A change of venue was then taken to Juneau, where a second trial was had upon the consolidated indictments before Judge Brown. This resulted in acquittal.

Since this question was seriously raised, the United States Attorney's office at Juneau has had to be excused from prosecuting two cases under the white slave traffic act, because success seemed impossible without joining two or more counts in the same indictment, and the cases had to be brought in Washington as a consequence.

It is a general rule that the practice adopted by the lower court will be upheld by the appellate tribunal when the question is either doubtful, or when no vital principle of right has been violated, as it is sound sense to pay due deference to the judgment of the lower courts on questions of procedure.

In this connection it should be remembered that Judge Lyons is no importation into the country. He is not a stranger to the procedure in the court over which he presides. He had practiced law some twelve or fourteen years in Alaska before he was elevated to a seat on the bench, and it is fair to presume that he did not in this case venture upon a new departure in procedure before the courts of the district.

All of which is respectfully submitted.

JOHN RUSTGARD,
Attorney for Defendant in Error.

APPENDIX A.

In the United States District Court for the District of Alaska, Division No. One.

No. 836–B.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE NORTH PACIFIC WHARVES AND TRADING COMPANY, a Corporation, PACIFIC AND ARCTIC RAILWAY AND NAVIGATION COMPANY, a Corporation, THE PACIFIC COAST COMPANY, a Corporation, PACIFIC COAST STEAMSHIP COMPANY, a Corporation, C. E. WYNN JOHNSON, E. E. BILLINGHURST, W. H. NANSEN, IRA BRONSON, J. C. FORD, J. W. SMITH, C. E. HOUSTON, A. L. BERDOE, and F. J. CUSHING,
Defendants.

Opinion.

JOHN RUSTGARD, Esq., United States Attorney, Counsel for the Government.

IRA BRONSON, Esq., *in propria persona,* ROYAL A. GUNNISON, Esq., BOGLE, GRAVES, MERRITT & BOGLE, SHACKLEFORD & BAYLESS, FARRELL, KANE & STRATTON, Counsel for the Defendants.

LYONS, District Judge:

It was agreed between counsel for the defendants

and for the Government in this case, as well as in cause No. 837–B, United States of America vs. Pacific and Arctic Railway and Navigation Company, a corporation, et al., that the questions tendered by the motion might be argued and considered by the Court in the same manner as if raised by demurrer. The Court will therefore consider the case as if a demurrer had been interposed, for in the opinion of the Court the questions presented should be raised by demurrer and not by motion to quash.

The first serious question raised is: Whether or not the indictment is vulnerable to the attack made upon it by the demurrer on account of charging more than one crime. The defendants demurred to the indictment in this and all of the other causes wherein more than one crime is set out in the indictment, and among the grounds assigned in said demurrer is that the indictment charges more than one crime. The defendants rely on section 43 of the Code of Criminal Procedure for the District of Alaska, which provides:

> "That the indictment must charge but one crime, and in one form only; except that where the crime may be committed by use of different means the indictment may allege the means in the alternative."

The Government contends that the section of the Code last cited is not applicable to the prosecution of crimes of the character charged in the indictment, but that the crimes being national in character the procedure with reference to the number of offenses or crimes which may be charged in an indictment is

found in section 1024 of the Revised Statutes of the United States, which provides as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such case the court may order them to be consolidated."

The question presented is interesting and the determination of the same is not free from difficulty. To uphold their contention the defendants rely on the peculiar wording of certain sections of the Code of Criminal Procedure for the District of Alaska and also upon the following adjudicated cases:

Hornbuckle vs. Toombs, 85 U. S. 21;
Clinton vs. Englebrecht, 80 U. S. 20;
Good vs. Martin, 95 U. S. 90;
Reynolds vs. United States, 98 U. S. 149;
Miles vs. United States, 103 U. S. 304;
Cochran vs. United States, 147 Fed. 10;
Jackson vs. United States, 102 Fed. 473;
Thiede vs. United States, 159 U. S. 510;
United States vs. Haskell, 169 Fed. 449;
Fitzpatrick vs. United States, 178 U. S. 302;
Welty vs. United States, 76 Pac. 122.

It will be observed, after a careful consideration of the case cited, that Clinton vs. Englebrecht and

Hornbuckle vs. Toombs, *supra,* are the leading cases cited by the defendants announcing the doctrine that the various territories created by Congress under the constitution and to whom Congress has delegated the power to legislate for themselves have been empowered under the organic acts creating them to legislate on all matters of local concern not inconsistent with the Constitution of the United States and the organic acts creating such territories. It will also be observed that all the organic acts creating the territories and empowering them to elect local legislatures to legislate for said territories contain substantially the same provision as that conferring legislative authority on the territory of Utah, which is quoted in Clinton vs. Englebrecht, 80 U. S., on page 444, as follows:

> "The legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States, and the provisions of this act."

It is apparent from such legislation that Congress intended that the legislatures of the various territories should be vested with full power to legislate not only concerning legal procedure, both criminal and civil, but also to enact any substantive legislation not inconsistent with the Constitution of the United States and the acts of Congress creating such territories. The Supreme Court of the United States in the cases of Clinton vs. Englebrecht and Hornbuckle vs. Toombs, *supra,* holds that the power granted to the legislatures to legislate for the territories, and

the approval of their legislation by Congress, indicates that it was the intention of Congress to lodge in the local legislatures of the territories power to legislate concerning all local matters and to approve such legislation when not in conflict with the Constitution of the United States or the organic acts of such territories. It must therefore be conceded to be the settled law that in a territory where a legislature has been provided for by act of Congress, such legislature has the power to provide for the procedure to govern the trial of all causes without reference to whether or not the same are being conducted under the local laws of the territory or under the general laws of the United States. The Alaska cases cited by counsel which have been passed on by our Appellate Court deal with questions of procedure in the prosecution of violations of the local law. It must be admitted that Alaska is an organized territory within the meaning of Section 1891 of the Revised Statutes of the United States, which provides:

> "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory hereafter organized as elsewhere within the United States."

Nagle vs. United States, 191 Fed. 141.

But does it follow because Congress has seen fit to grant to the legislatures of the territories where legislative assemblies are provided to enact a complete set of laws governing procedure in all cases,

that it did not intend to extend to Alaska any of the general laws of the United States providing for the procedure in federal courts? This question must be answered after a careful consideration of the various acts of Congress relating to the organization of the District Court for the District of Alaska and laws of procedure for said District. On May 17, 1884, Congress passed an Act entitled "An Act Providing a Civil Government for Alaska," 23 Stat. L. 24, c. 53. Section 3 of that Act provides, among other things:

> "That there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law."

On June 6, 1900, Congress passed another Act entitled "An Act Making Further Provision for a Civil Government for Alaska, and for other purposes," 31 Stat. L. 321, c. 786. The last mentioned Act includes a Political Code, a Code of Civil Procedure, and a Civil Code for the District of Alaska. Section 4 of said Political Code, found on page 132 of Carter's Annotated Alaska Codes, provides, among other things:

> "There is hereby established a district court for the district, which shall be a court of general jurisdiction in civil, criminal, equity, and ad-

> miralty causes; and three district judges shall be appointed for the district, who shall, during their terms of office, reside in the divisions of the district to which they may be respectively assigned by the President."

On March 3, 1909, Congress passed an additional Act entitled "An Act to Amend Section 86 of an Act to Provide a Government for the Territory of Hawaii; to Provide for Additional Judges; and for other purposes," 35 Stat. L. 838, c. 269. Section 4 of the last mentioned Act provides, among other things:

> "That there is hereby established a district court for the district of Alaska with the jurisdiction of circuit and district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes."

By the Act of May 17, 1884, *supra,* the District Court of Alaska is granted dual jurisdiction; that is, the jurisdiction of an ordinary court of record to hear, try and determine all causes, both civil and criminal, of a local nature, and also the same jurisdiction as a district court of the United States, as well as the jurisdiction of a District Court of the United States exercising the jurisdiction of a Circuit Court of the United States. The Act of June 6, 1900, *supra,* limited the jurisdiction of the District Court for the District of Alaska to the trial of local causes. United States vs. Newth, 149 Fed. 302. But the Act of March 3, 1909, *supra,* again conferred such dual jurisdiction upon the District Court for

the District of Alaska which was granted to it by the original organic act of May 17, 1884, *supra*. It is obvious, therefore, that from May 17, 1884, until June 6, 1900, the District Court for the District of Alaska was empowered to exercise dual jurisdiction. From June 6, 1900, until March 3, 1909, the jurisdiction of the District Court for the District of Alaska was confined to matters of local concern. But by the passage of the act of Congress of March 3, 1909, the District Court for the District of Alaska was again clothed with dual jurisdiction. It is manifest, therefore, that the District Court for the District of Alaska has now jurisdiction of the violations of all local laws of the District of Alaska as well as the violations of all national laws applicable to the District of Alaska when the same are committed within the territorial limits of the District or on the high seas.

Section 7 of the Act of May 17, 1884, *supra*, provides:

> "That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States."

On March 3, 1899, Congress passed an Act entitled "An Act to Define and Punish Crimes in the District of Alaska and to Provide a Code of Criminal Procedure for said District," 30 Stat. L. 1253. The last mentioned Act contains a Penal Code and a Code of Criminal Procedure. Sections 1, 10 and 13 of the

Code of Criminal Procedure, found on pages 45, 46 and 47 of Carter's Annotated Alaska Codes, provide:

> "Section 1. That proceedings for the punishment and prevention of the crimes defined in Title I of this act shall be conducted in the manner herein provided."
>
> "Section 10. That grand juries, to inquire of the crimes designated in Title one of this act, committed or triable within said District, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts, the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said District, as well those that are designated in Title one of this act as those that are defined in other laws of the United States.
>
> "Section 13. That the grand jury have power, and it is their duty, to inquire into all crimes committed or triable within the jurisdiction of the court, and present them to the court, either by presentment or indictment, as provided in this act."

The determination, therefore, of the question now under consideration may be solved by a correct interpretation of the three sections of the Code of Criminal Procedure for the District of Alaska last quoted. The defendants contend that section 13 must control, and that by section 13 it is provided

that all presentments or indictments must be in accordance with such Code of Criminal Procedure, and, therefore, must be drawn in accordance with section 43, heretofore quoted, which provides that each indictment must charge but one crime and in one form only. The Government contends that section 1 and section 10 must be construed with section 13 in such manner as to give effect to each and all of said sections. By section 1 it is provided that all crimes defined in Title I of the Penal Code for the District of Alaska must be prosecuted in the manner provided in the Code of Criminal Procedure. Applying the maxim "*Expressio unius est exclusio alterius*" to such section, that is: that express mention of anything in a statute implies the exclusion of all other things, forces the conclusion that the prosecution of all other laws not defined in Title I must be prosecuted in accordance with some other procedure. It is impossible to harmonize the letter of the language used in section 10 with section 1 or with any other part of the Code of Criminal Procedure for the District of Alaska, for section 10 provides, among other things:

> "That grand juries, to inquire of the crimes designated in title one of this Act, committed or triable within said District, shall be selected and summoned, and their proceedings shall be conducted, in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts."

It is true that grand juries to inquire of the crimes defined in Title I, *supra*, are selected and summoned

in the manner prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts, but their proceedings are not conducted in the manner prescribed by such laws, for the manner of their proceeding is completely defined and prescribed by the Code of Criminal Procedure itself. What, therefore, is the meaning of and what construction can be given to section 10, *supra*, which will cause it to harmonize with sections 1 and 13 and give effect to all such sections? It is apparent that the framers of section 10 had in mind dual procedure for the District Court for the District of Alaska in the prosecution of crimes, because the Code of Criminal Procedure prescribes a procedure which governs grand juries while they are investigating local or territorial crimes; but section 10 provides that the grand juries shall be governed by the rules of proceedings prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts. It is evident, therefore, that it is necessary in order to arrive at a correct construction of section 10 that the Court disregard its letter and give force and effect to its spirit. While its language is confusing and contradicts section 1, as well as other provisions of the Code of Criminal Procedure, when carefully considered in the light of the dual powers of the Court as well as the other sections of the Code of Criminal Procedure, it is reasonably clear that Congress intended by section 10 to provide for two methods of procedure: one to govern the trial of offenses against the general laws of the United States,

and the other to govern the proceedings in the prosecution of local or territorial crimes defined in Title I of the Act to define and punish crimes in the District of Alaska and to provide a Code of Criminal Procedure in said district. Section 10, therefore, should receive the construction which would be warranted if it contained the following language:

> "That grand juries, to inquire of the crimes designated in Title one of this Act, committed or triable within said District, shall be selected and summoned in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts; and grand juries, to inquire of crimes defined in other laws of the United States, committed or triable within said District, shall be selected and summoned and their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts: the true intent and meaning of this section being that but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district, as well those that are designated in Title One of this Act as those that are defined in other laws of the United States."

Such a construction gives effect to the entire section, reconciles it with all other parts of the Code of Criminal Procedure, and harmonizes with all other congressional legislation regarding the organization of the District Court for the District of Alaska, its

jurisdiction and procedure.

"Closely allied to the doctrine of the equitable construction of statutes, and in pursuance of the general object of enforcing the intention of the legislature, is the rule that the spirit of reason of the law will prevail over its letter. Especially is this rule applicable where the literal meaning is absurd, or, if given effect, would work injustice, or where the provision was inserted through inadvertence. Words may accordingly be rejected and others substituted, even though the effect is to make portions of the statute entirely inoperative. So the meaning of general terms may be restrained by the spirit or reason of the statute, and general language may be construed to admit implied exceptions."

36 Cyc. 1108 and 1109, and cases cited;

Holy Trinity Church vs. United States, 143 U. S. 457;

Interstate Drainage & Investment Company vs. Board of Commissioners, 158 Federal, 270.

In the opinion of the last mentioned case, on page 273, the Court used the following language:

"The essential object of judicial construction of a statute is to discover the legislative mind in enacting it. The first step in the analysis is to perceive from the face of the whole act what was the underlying purpose. The intention of a legislative act may often be gathered from a view of the whole and every part of a statute taken and compared together. When the true intention is accurately ascertained, it will always prevail

over the literal sense of the terms. The occasion and necessity of the law, the mischief felt, and the object and remedy in view are to be considered. When the expression in a statute is special or particular, but the reason general, the special shall be deemed general, and the reason and intention of the law-giver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity."

See, also, Wisconsin Industrial School for Girls vs. Clark County, 79 N. W. Rep. 422; State vs. Railroad Commission, 117 N. W. Rep. 846; wherein the Court, among other things, said:

"The actual judicially determined legislative intent must always govern if expressed at all so as to be discernible by the searchlights which the court possesses. They permit of looking at a written law as a whole, to the subject with which it deals, to the reason and spirit thereof, to give words a broad or narrow construction, going either way to the limits of their reasonable scope, to supply omitted words which are clearly in place by implication, to change one word for another in case of the wrong one being clearly used and so read out of the enactment the real intent, even though it may be contrary to the letter thereof. . . . . One of the most familiar and safe canons of construction may be stated thus: for the purpose of clearing up obscurities in a law it should be read with reference to the leading idea thereof,—such idea being regarded as such

limitation upon particular words or clauses and expansion of others within the scope thereof, in connection with that of words clearly implied,—and be thus, if reasonably practicable, brought into harmony with such idea."

Unless section 10 is construed so as to limit the following language:

"That their proceedings shall be conducted in the manner prescribed by the laws of the United States with respect to grand juries of the United States district and circuit courts,"

in its application to the rules of procedure that govern the grand jury while investigating violations of the general laws of the United States, it is meaningless, and contradicts section 1 as well as all other provisions of the Code of Criminal Procedure, for it isn't true that grand juries when investigating crimes defined in Title I, *supra,* follow the procedure governing grand juries of United States courts; but do follow the procedure prescribed by the Code of Criminal Procedure.

We must next consider the true intent and meaning of section 13, bearing in mind that section 10 provides that grand juries inquiring of crimes not defined in Title I, *supra,* shall be governed by the procedure followed by grand juries of the United States District and Circuit Courts. We find that section 13 does not in any manner contradict section 10 when so construed, for it provides:

"That the grand jury have power and it is their duty to inquire into all crimes committed or triable within the jurisdiction of the court

and present them to the court either by presentment or indictment, as provided in this Act."

That is, if the grand jury is investigating a local crime, it shall follow the specific provisions of the Code of Criminal Procedure; if it is investigating national crimes, or infractions of laws not defined in Title I, it shall follow the procedure prescribed by the laws of the United States with respect to grand juries of the United States District and Circuit Courts. Thus, both procedures are provided for by this Act, that is, the Act to define and punish crimes in the District of Alaska and to provide a Code of Criminal Procedure in said District, by giving section 10 the construction heretofore indicated. The proceedings prescribed by the laws of the United States with respect to grand juries for the United States District and Circuit Courts are a part of the Code of Criminal Procedure, and are made to apply to and govern the grand jury when investigating violations of laws other than those defined in Title I, *supra;* that is: Section 10 incorporates in and makes such procedure a part of the Act referred to in section 13, and when the grand jury, while inquiring into violations or infractions of the general laws of the United States, follows the federal procedure, it is proceeding according to the requirements of section 13. Nor does such a construction of the three sections in any way bring section 1 in conflict with the other two sections, for section 1 provides for the entire proceeding in the punishment of crimes defined in Title I; not only the proceedings that govern the grand jury but also the proceedings that gov-

ern the trial of such criminal cases, while sections 10 and 13 merely deal with the proceedings of the grand jury.

"Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. With this purpose in view, therefore, it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions, and even those which have been repealed. So far as reasonably possible, the several statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments. Whenever a legislature has used a word in a statute in one sense and with

one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby. It must not be overlooked, however, that the rule requiring statutes *in pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and that it cannot be invoked where the language of a statute is clear and unambiguous."

36 Cyc. 1147, 1148, 1149, 1150, and cases cited.

In the light of the fact that Congress has seen fit to confer on the District Court for the District of Alaska the jurisdiction of a United States District Court and the consequent power to try all cases involving the violation or infraction of the national laws committed within the said District, and in the further light of section 1891 of the Revised Statutes, which extends to all territories the constitution and all laws of the United States that are not locally inapplicable, which section has been held to apply to Alaska (Nagle vs. United States, 191 Fed. 141), the Court should not assume that the provisions of the general statutes of the United States governing the procedure in the federal courts were not extended to the District of Alaska unless the legislation of Congress makes manifest its intent to extend only the substantive laws of the United States to the District and to withhold the general laws of procedure. It follows, therefore, that section 1024 of the Revised Statutes, *supra,* applies to Alaska, and may be fol-

lowed by the grand jury when considering infractions of laws of the United States not defined in Title I of the Act to define and punish crimes within the District of Alaska and to provide a Code of Criminal Procedure for said District.

Since Congress has reserved to itself the exclusive power to legislate for Alaska, has extended to this territory all the general laws of the United States not locally inapplicable, and has conferred on this Court the jurisdiction of a United States District Court to punish all violations of such laws, what could be its purpose in refusing to extend to this district the laws and rules of procedure of the United States District Courts, which the light of experience has proved to be so adequate and satisfactory in the prosecution of offenses of the character charged in the indictment. Section 1 of the Code of Criminal Procedure, *supra*, clearly implies the existence of other rules of procedure applicable to inquiries concerning crimes not defined in Title I of that Act and the intention of Congress to provide such other rules of procedure to govern the proceedings of the grand jury when inquiring into violations of the general laws of the United States is manifested in section 10 of the same code.

The defendants further contend that section 2 of what is commonly known as the Sherman Act does not apply to Alaska, for it provides:

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Given in open court at Juneau, Alaska, on the 29th day of April, 1912.

THOMAS R. LYONS,
Judge.

APPENDIX B.

Oral Opinion of Trial Court, Case at Bar.

Ten o'clock A. M., Monday, May 20, 1912.

Mr. SHACKLEFORD.—If the Court please, in the case of the United States versus Summers, I have filed a formal election to stand on the demurrer, and if your Honor desires to examine it I presume it is on file.

Mr. RUSTGARD.—I wish the journal to show that I object to that form of procedure at this time; that the procedure should be had as provided by sections 1026 and 1032 of the Revised Statutes, and I put my objection in the form that I would like it to go on the journal, your Honor.

Mr. SHACKLEFORD.—Have you the original election? That simply raises the question which was argued the other afternoon. We are ready to submit the motion also.

The COURT (LYONS, J.).—I have given the matter considerable consideration, gentlemen, and gave it extended consideration at the time of an analogous question in the case of the Transportation cases—in the case of the United States versus The Pacific and Arctic Railway and Navigation Company, and others. In that case the demurrer was interposed to the indictment and alleged, among other things, that the indictment joined more than one count and for that reason was not in accordance with the provisions of the local code. The Court held that the prosecution being for an infraction of the laws of the United States, general laws of the United States,

or one of them, the procedure provided for in the local code did not apply and overruled the demurrer for that reason.

The question is now raised as to whether or not after proceeding beyond the indictment whether or not the Federal procedure still obtains or the local code governs. It is true, as argued by counsel for the defendant, that the Court based its ruling largely in the Transportation cases on the construction of three sections of the criminal code, to wit: 1, 10 and 13; which seemed to the court to negative the idea that only one system of practice obtains in Alaska, and that section 10 in the nature of things must contemplate two procedures, for it says that grand juries shall be selected and summoned and their proceedings shall be in accordance with the laws of the United States. If the letter of that statute is followed, it renders nugatory the entire local code governing the trial of local cases; so the Court held that what the statute must mean was that when prosecuting cases for infractions of the general laws that the law means that grand juries shall be selected and summoned and their proceedings shall be governed by the general laws of the United States, but when the grand jury is operating within the jurisdiction of a territorial organization purely, then the grand jury is summoned and selected according to the laws of the United States, the general laws of the United States, but their procedure is governed by the local code.

Proceeding, now, and assuming that the Court was right in so holding, and I will say, gentlemen, that

the more I consider the question—while I realize it is not entirely free from difficulty—the more I reflect on the matter, the more I am convinced that that is the only theory upon which to proceed to give all the laws which apply to Alaska a reasonable construction. Section 1891 of the Revised Statutes of the United States provides the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory wherever organized as elsewhere within the United States. There has been some controversy in the past whether or not that section applied to the District of Alaska, but that has been settled by the Nagle case that Alaska is an organized territory within the meaning of that statute, and that all of the laws of the United States and the Constitution, unless the laws are locally inapplicable, are the laws of the District of Alaska the same as they are in every part of the United States. That being true, what position are we in? We read, then, in conjunction with that the opening section of the Code of Criminal Procedure, which provides as follows:

> "That proceedings for the punishment and prevention of the crimes defined in Title I of this Act shall be conducted in the manner herein provided."

We find in Title I that it refers to the Criminal Code of the District of Alaska. Under the maxim that the expression of one means the exclusion of others, the natural and inevitable construction placed

upon that, the opening section, is that the Code of Criminal Procedure applies to the crimes defined in Title I, which are laws peculiarly local in their nature and only refer to the District of Alaska and to no other part of the United States. Now, proceeding, then, and it seems to me that is a fair and reasonable construction of that section, taking that in conjunction with the section of the United States statutes just read, section 1891, and what have we? We have section 1891 transferring all the laws of the United States to the District of Alaska not locally inapplicable. Now, why say that transfers the substantive law but not the law of procedure? It would seem that if Congress conceived the idea it was necessary to transfer the substantive law, that unless its will were declared in specific terms to the contrary that the law of procedure should also follow. Now, what is there about the federal practice which cannot be considered applicable in the District of Alaska? The peculiar character of the crime charged? The same is true of the Transportation case, which has been deemed wise to allow the joinder of more than one count. If that is true in the State of Washington, why shouldn't it be true in the District of Alaska. Of course, I don't mean to say that if there is anything in the acts of Congress that indicate the contrary that this court has any right, or any other court has any right, to say that because it looks reasonable it must be so, but if it looks reasonable and if it is in consonance with the reasonable construction of our own statute, and if there is nothing in any of the acts of Congress which declare to the con-

trary, then why should Congress say we will give you the substantive law, but we will withhold the ordinary machinery which is followed in the trial of an infraction of such law?

Now, let us see if there is anything in conflict with that in the cases that counsel cites. In the Coquitlam case the only question involved was whether or not an appeal would lie from this District Court to the Circuit Court of Appeals, the Circuit Court of Appeals having been constructed by the act of 1891. It was conceived that because the words "District and Circuit Courts of the United States" were used and only referred to constitutional courts, this not being a constitutional court, therefore no appeal would lie from it. The Supreme Court of the United States held that it was a Supreme Court of the territory, the highest court in the territory, and for that reason under other provisions of the same act an appeal would lie to the Circuit Court of Appeals for the Ninth Circuit. In the McAllister case, counsel is right when he contends that the question was as to whether or not the President of the United States could remove or suspend a Judge of this court, and the majority of the Court held that he could, and held that the act under which he dismissed Judge McAllister and which act excepted from the power of the President to so dismiss courts of the United States. Justice Harland, in writing the opinion of the majority of the court, held that this was not a court of the United States under the third article of the Constitution, which provides that the judicial power of the United States shall be reposed in a Su-

preme Court and as many inferior courts as Congress may from time to time organize and create, but that this was a court created by Congress under the general provisions of the Constitution, which provide that Congress has complete control over the territories and may legislate for them as it sees fit.

Is there anything incompatible with saying that this is not a court of the United States in the constitutional sense and the ruling of the court on this occasion? I think not, Mr. Shackleford. I concur with you when you say it isn't a court of the United States in a constitutional sense. I will go further and agree with you that when the acts of Congress mention courts of the United States, they don't mean this court, because this is a territorial court pure and simple, but it exercises the jurisdiction of courts of the United States and when it exercises the jurisdiction of courts of the United States and when Congress says that all laws not locally inapplicable are transferred to the District of Alaska, then it seems to me that it is a perfectly natural construction to give it, although it is not a court of the United States. Yet, when it is sitting and exercising that jurisdiction to enforce the laws of the United States, unless there is some negativing act of Congress withdrawing from it the right to use the procedure which the federal courts use, under that section of the act of Congress, it is a natural and reasonable construction to give it that not only the substantive law but the machinery, the procedure which enables the court to enforce the substantive law, applies, and unless I am wrong in the ruling in the Transportation case, I am

satisfied that the Court is right now, because one couldn't be correct, in my judgment, and the other incorrect, because if a portion of the procedure is applicable, the whole of it is applicable. Therefore, it seems to me that the only procedure that can be followed in this case is the federal procedure, and that deprives the court of the power to enter a judgment in a criminal case against any man without a trial.

Ten o'clock A. M., Tuesday, May 21, 1912.

COURT.—In the case of the United States against Summers, while I am satisfied, as held yesterday, that the federal practice prevails in Alaska, yet I am also satisfied that practice can be waived so long as it is invited by the defendant himself. However, I wasn't giving this matter any consideration yesterday. The only question before the Court for consideration was whether or not the federal practice or the local practice obtained, and I am satisfied that the federal practice obtains; that is, I say it is a matter of procedure, and I am satisfied that the defendant can waive any procedure under the Diaz case and elect to stand on the local practice. Now, at this time, I understand the defendant still asks to be sentenced without proceeding further with the trial.

Mr. SUMMERS.—Yes, sir.